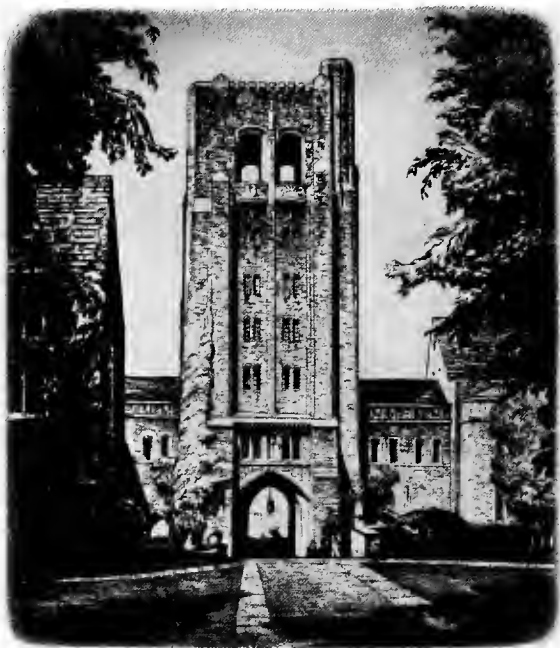




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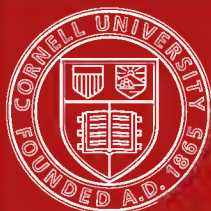
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The Law of Government Contracts

By

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PREFACE

Nearly one hundred thousand corporations and firms are interested in governmental contracts. It is therefore obvious that it would be of advantage to both the lawyer and the business man to have in readily accessible book form the statutes providing for and regulating contracts with the government, the leading decisions construing these statutes, and practical suggestions as to the status and duties of the government officers in calling for bids and awarding contracts. A clear statement of the rights and obligations of the bidders to whom these contracts are awarded, and a trustworthy description of the procedure for the collection of and enforcement of claims against the United States arising out of such contracts is of equal importance.

The preparation of the present volume was commenced prior to the outbreak of the Great War. War work of various kinds has interfered greatly with its progress. It is now complete and the confusion and perplexities of emergency war preparations, which naturally led to errors of judgment in regard to government contracts and misinterpretation of statutes and decisions bearing thereon, render the early production of the book most desirable.

At the suggestion of members of the National Association of Credit Men, with which organization the author has been pleasantly identified for some years, the book has been so written and compiled as to be of service not only to the trained lawyer but also to the intelligent business man. Thus it is that this work, in addition to the statutes and to the discussions of the cases interpreting them, also contains much material of a practical nature not ordinarily found in legal works.

In conclusion, the author desires to acknowledge his deep indebtedness for assistance in the preparation of this book to Oscar D. Clarke, Librarian of the Law Library of the Supreme Court of the United States.

R. PRESTON SHEALEY.

Washington, D. C.

May 2, 1919.

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THE LAW OF GOVERNMENT CONTRACTS

PART I

PRELIMINARY OBSERVATIONS AND DEFINITIONS

CHAPTER I

GOVERNMENT AND INDIVIDUAL CONTRACTS COMPARED AND DISTINGUISHED

§ 1. Constituents of a Valid Contract

Chief Justice Marshall has, in brief terms, defined a contract as "an agreement to do, or not to do, a particular thing" (*Sturgis v. Crowninshield*, 4 Wheat. 122 [1819]), while a New York court has given another definition in broader terms, as follows: "A bargain or an agreement voluntarily made upon good consideration, between two or more persons, capable of contracting to do, or forbear to do, some lawful act." (*Justice v. Lang*, 42 N. Y. 493 [1870].)

To constitute a valid and complete contract there must be certain elements present. There must be an agreement which creates an obligation, and the agreement must be enforceable at law. The latter element has been very generally overlooked or lost sight of by judges and writers. To speak of a void contract is absurd, for, while an agreement may be void by lack of legal effect, it must ever be remembered that a contract is an agreement plus a legal obligation and, thus, where there is no obligation there is no contract. Pollock says: "A contract consists in an actionable promise or promises." (Pollock on Contracts, 8.)

Mutuality of understanding, legality of consideration and object, competency of the parties, definiteness as to terms, time of performance, and acceptance, formal requisites, and the absence of all illegality are the remaining factors which control in the making of contracts and in their enforcement.

§ 2. Power of United States to Contract

The United States is a sovereignty, but it can contract, and when, acting through its authorized agents, it agrees with one of its citizens—the term including partnerships and corporations as well as individuals—to do or not to do a particular thing, the law implies that it has so agreed, and this agreement becomes a government contract.

§ 3. The Government as a Contractor

In a broad sense and subject to statutory limitations, the United States, when it contracts with its citizens, is controlled by the same laws that govern citizens under similar conditions, and all obligations which would be implied against citizens under the same circumstances will be implied against it. (*United States v. Tingey*, 5 Peters 115 [1831]; *United States v. Bradley*, 10 Peters 343 [1836]; *United States v. Bostwick*, 94 U. S. 53 [1876]; *United States v. Whiteside*, 93 U. S. 247 [1876]; and, *United States v. North American Co.*, 74 Fed. 145 [1896].) The Supreme Court of the United States has expressed this thought in the following language: "If it (the United States) comes down from its position of sovereignty and enters the domain of commerce it submits itself to the same laws that govern individuals there." (*Cooke v. United States*, 91 U. S. 389, 398 [1875].)

While the Supreme Court has laid down this general rule in the cases cited yet there are several limitations to the rule. In certain respects the government, when it appears as a contractor, is regarded quite differently from the private citizen. These points must always be borne in mind. The more important of them may be explained here.

§ 4. Burden of Proof as to Fraud

As between man and man and when dealing under ordinary conditions fraud must be affirmatively proved if a

contract is to be set aside. But the rule is different when the domain of government contracts is entered, since in one noted case in which the government could not affirmatively show fraud to exist, a recovery was denied the claimant when it was shown that the government had paid many times the market value of an article, the unconscionable price supplying the place of positive evidence of fraud. (*Hume v. United States*, 132 U. S. 406 [1889].)

The case is referred to here only to illustrate one of the several limitations stated and not for the purpose of laying down any rule as to what price will be considered so excessive as to imply fraud, for as a matter of fact in *Wentworth's* case (5 Ct. Cl. 302 [1869]), where there was in question a contract for the purchase of naval supplies from a middleman, a much higher price than the manufacturer's price was sustained. It was shown that there was not sufficient time to learn the place of manufacture nor the manufacturer's price, and that the public exigency demanded an immediate delivery and consequent payment of the higher price. In other words, while a high price will not always set aside a government contract and never, of course, invalidates a private contract, unless accompanied by certain other circumstances, nevertheless when an exceptionally high price has been shown to have been paid or contracted to be paid by the government, the burden of proof will be on the contractor to explain satisfactorily the high price. In private contracts this is not the case.

The subject will be discussed in detail later on. It is wise, however, to refer to pertinent decisions of the United States courts which explain the reasons for the view.

The United States Court of Claims said, in *Garman, Adm. v. United States*, 34 Ct. Cl. 237 (1899): "This court has always regarded the government as somewhat in the character of a ward, and its officers in the character of its guardian, and

it has never given effect to a contract where it appeared that the contractor directly or indirectly, by direct bribes or corrupt influences, sought to impair the good faith of the guardian." The Supreme Court has also said that such influences in the awarding of contracts are most reprehensible and vitiate the contract, justifying its rescission (annulment), even though the contractor had no actual knowledge of the fact that his agents had made secret arrangements with government officials by which they shared in profits. (*Crocker v. United States*, 240 U. S. 74 [1916].)

In substance, when one is dealing with the government he must consider himself the trustee and the government as the beneficiary under the trust. If this be kept in mind much worry and care and possible loss may be avoided.

§ 5. Estoppel as Affecting Authority of Government Agent

A second and equally important distinction is laid down in *Cooke v. United States*, 91 U. S. 389 (1875), relating to the matter of estoppel (inability because of one's own act or admission) to deny the authority of an agent. Suppose, for instance, that the John Jones Company, a corporation, permits John Doe to appear in the public eye as its general manager or proper contracting officer, even though John Doe does not actually have the power to make contracts in its behalf as such. If John Doe does make such a contract the corporation will be estopped (barred by its own act or admission) from denying his authority and will have to carry out the contract or be liable in damages for its breach. With respect to such acts and declarations on the part of public agents, however, different rules prevail. To quote the court: ". . . principals in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without authority, if it appear that the act was done or declaration was made by the agent in

the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government." (Whiteside v. United States, 93 U. S. 247, 256 [1876].)

In the following case the same principle appears in slightly different form. A private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, but the rule as to the effect of a like act of a public agent is otherwise. The reason for this second general exception seems to be that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than that a rule should be adopted which, through improper combinations or collusion, might be turned to the injury of the public. Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule of law that ignorance of the law furnishes no excuse for any mistake or wrongful act, applies with particular force in matters of government contracts.

Chief Justice Nott of the Court of Claims in a dissenting opinion reported in the case of *Saloman v. United States*, 7 Ct. Cl. 491 (1871), uses language touching on this point which is applicable here and correctly states the law: ". . . there is this difference between individuals and the government—that the former are liable to an extent of the power that they have apparently given to their agents, while the government is liable only to the extent of the power it has actually given to its officers."

In other words, government officers are agents with limited powers and certain prescribed discretion, and the contractor must in all circumstances see for himself that his contract

comes within the terms of the law. The unauthorized acts of officers of the United States in the making of agreements "cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States." (*Filor v. United States*, 9 Wall. 45 [1869], affirming 3 Ct. Cl. 25 [1867].)

The authority of government officers to contract is one of such importance that it will be treated more extensively in another section of this work. Before closing this subject the general rule may again be emphasized as stated in the *Cooke* case, namely, that the United States has the power—just as an individual has—to make a valid contract; and that this power may be exercised without express authority of statutory direction, though subject to statutory limitation. For instance, the United States can require a bond from a contractor even though the statute under which the particular contract has been let makes no mention of a bond. So it follows that when the government has required bonds where no statute is in existence requiring them, suits on such bonds will be sustained. This idea has been carried out in recent contracts of the War Department in which the contractor has given not only the bond required by the Heard Act, but also another bond which is to be held valid, directly guaranteeing the payment of subcontractor's bills. (*Jessup v. United States*, 106 U. S. 147 [1882]; *Diamond Match Co. v. United States*, 31 Fed. 271 [1887]; *Rogers v. United States*, 32 Fed. 890 [1887]; *United States v. Jones*, 77 Fed. 717 [1896]; *Laffan v. United States*, 122 Fed. 333 [1903]; *Howgate v. United States*, 3 App. D. C. 277, 295 [1894]; *United States v. Pumphrey*, 11 App. D. C. 44, 48 [1897].)

CHAPTER II

CONTRACTS CLASSIFIED

§ 6. Kinds of Contracts

Having defined a contract and outlined some of the general differences between government and private contracts, the classes into which contracts generally, and government contracts especially, are divided may next be considered :

1. Express and implied contracts
2. Executed and executory contracts
3. Written and oral contracts

§ 7. Express Contracts

Express contracts may be defined to be those in which the terms of the agreement are fully stated and agreed upon at the time of making. To quote the language of the Court of Claims (*Mayer v. United States*, 5 Ct. Cl. 317 [1869]), an express contract may be said to have been made "when a proposition made by one party is met by an acceptance on the part of the other, which corresponds with it entirely and adequately."

Express contracts may be either written or oral, executed or executory.

§ 8. Implied Contracts

Implied contracts, in the ordinary sense, arise in those cases in which no contract of any kind was explicitly made, but in which, from the circumstances and facts, the law raises the presumption that the parties had intended to contract and did in fact contract. Implied contracts arise as between individuals, and also as between individuals and the government.

Under its sovereign rights set forth in the Federal Constitution and its amendments, the government can seize personal as well as real property, and when it does so the law will imply an agreement on the part of the government to pay for property so taken. (See Act of October 6, 1917, and July 1, 1918, authorizing commandeering of property by officials and specifying methods of compensation.)

§ 9. Executed and Executory Contracts

Executed contracts are: (1) those contracts which have been performed so that nothing remains to be done by either party, and (2) those in which the transaction was completed at the time the contract or agreement was made, as where an article is sold and delivered and payment therefor is made on the spot.

Executory contracts are those in which some act remains to be done, as when an agreement is made to build a house in six months, to do an act before some future date, etc. (*Fletcher v. Peck*, 6 Cra. U. S. 87, 136 [1810]; 3 L. Ed. 162.)

§ 10. Written and Oral or Parol Contracts

Written contracts are defined to be those express contracts the terms of which have been put in writing.

Under federal statutes, particularly Section 3744 of the Revised Statutes, certain of the government departments are required to evidence their agreements by a formal written contract signed by both parties, at the end thereof, and as to those departments such a written contract alone is valid. When there is no such statute applicable, a written bid, accepted in writing, will be sufficient to constitute a valid, informal written contract.

Oral or parol contracts are stated to be express contracts made orally.

CHAPTER III

WHEN A GOVERNMENT CONTRACT IS VALID

§ 11. Authority of Government Agent to Contract

The United States, as was pointed out in the first chapter, has the right, subject to self-imposed restrictions and limitations, to make a valid and binding contract. As an attribute of sovereignty, the right may be exercised even without express authority and direction. In order, however, to safeguard the interests of the government, Congress has seen fit to enact sundry statutes—directory, mandatory, or prohibitive in character—for the guidance of the executive departments and officers of the United States in entering into agreements or assuming financial obligations.

As the question of the authority by which a contracting officer assumes to bind the government by contract is a fundamental one, and one which should present itself to the contractor before he enters into any agreement, it is proper to consider here this phase of the law. The subject naturally divides itself into two branches. These are:

1. The validity of the contract as affected by directory, mandatory, or prohibitive statutes.
2. The validity of the contract as affected by lack of authority in the particular officer representing the United States.

§ 12. Validity as Affected by Statute

Subject to certain exceptions, named in Revised Statutes, Section 3648 (see Appendix D), and others made by later statutes (principally war legislation), to which attention will be directed, in all cases of contract for the performance of

any service or for the delivery of articles of any description for the use of the United States, payment must not exceed the value of the service rendered, or of the articles delivered previously to such payment. In general it may be said that the Act of 1820, as well as that of 1861, expressly forbid the making of contracts when there is not a law authorizing them, nor appropriation adequate to their fulfilment. (See *Fowler v. United States*, 3 Ct. Cl. 43, 48 [1867].)

The first act referred to does not preclude a payment where the money has been actually earned and the government has received an equivalent therefor (18 Op. Atty. Gen. 105 [1885]), or where the contractor has performed some service, even if the government has received no benefit therefrom (*McClure v. United States*, 19 Ct. Cl. 173 [1884]), but it does prevent part payments upon contracts unless the United States thereupon becomes the owner of the work paid for (20 Op. Atty. Gen. 746 [1894]).

By another statute (Act of June 30, 1906 [Appendix D]), Congress has provided that: "No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States or to authorize the execution of a contract involving the payment of money in excess of appropriation made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed." Another act (34 Stat. 764; R. S. 3679 as amended) makes it unlawful for any executive department or other governmental establishment to involve the government in any contract or other obligation for the future payment of money in excess of such appropriation, unless such contract or obligation is authorized by law, or unless the obligation is capable of definite ascertainment by the terms of the contract. This section, together with Section 3732, Revised Statutes, in effect prohibits any expenditure or contract in

behalf of the government in excess of appropriations therefor, except in the War and Navy Departments for specific purposes named in the latter statute. The Act of March 4, 1909, 35 Stat. 1106, applicable to public building contracts, provides a penalty for contracting in excess of an appropriation. (Appendix D.) At this point it is well to point out that the Army Appropriation Bill, approved July 9, 1918 (see Appendix D), authorizes disbursing officers of the army in an emergency, and when obligations are pressing, to make the payments from other balances. Statutory limitations on the authority of these officers to contract must, therefore, be read in the light of this provision.

§ 13. Application of Statute to Contracting Officer

Officers of the United States acting under the authority of the heads of the executive departments in the making of contracts and parties with whom they may contract would, of course, be charged with knowledge of the statutes involved and be responsible for any wilful violation of them. It may sometimes happen, however, that prior expenditures will not be known to them. Under these circumstances, they may properly obey instructions or innocently enter into contract only to have payments refused after services are rendered or supplies furnished because it has been subsequently discovered that the limit of the appropriation has been exceeded and that the contract is therefore illegal.

In the case of *Leavitt v. United States*, 34 Fed. 623 (1888), a United States consul sought reimbursement for funds expended in obedience to instructions issued by the Department of State in the purchase of articles to be used by the department. Out of these instructions and the consul's actions in response thereto, there arose an implied contract that the United States would make payment. At the time the bill was presented to the department, the appropriation under

which disbursement should have been made was exhausted, and payment was therefore refused.

In its opinion the court points out that the petitioner was not in a position to know whether the multitude of expenditures made by the department under this act in the aggregate exceeded the sum appropriated, or to question the authority of the department to give the order. In this connection the court said: "It would have been a singular proceeding if, before acting upon the circular, the petitioner should have endeavored to verify the authority of the State Department by an inquiry into the number and amount of previous or contemporaneous orders. Such inquiries would be likely to be deemed meddlesome and insubordinate, and followed by speedy removal from office. He had a right to rely upon the presumption that the head of the department was acting within the prescribed limits of his authority."

Every consideration of justice supports these views of the court and the judgment which the petitioner secured. On the other hand, a reading of the entire opinion leads to the conclusion that recovery would have been barred had proof been submitted by the United States that the appropriation had been exhausted before the instructions of the department were received and acted upon by the consul, or, in other words, before the implied contract arose.

§ 14. Construction of Act by Court of Claims

But the Court of Claims has refused thus to limit the right of recovery under similar circumstances, saying (*Dougherty v. United States*, 18 Ct. Cl. 496 [1883]): "Next it is said that the contract was void because the annual appropriation had, at the time of the purchase, been covered by other contracts. We held in *Shipman's case* this term that when one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to

know the amount of the appropriation, and cannot recover beyond it; but we have never held that persons contracting with the government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the department. To do so might block the wheels of the government. The statutory restraint in this respect applies to the official, but it does not affect the rights in this court of the citizen honestly contracting with the government."

The contractor is held to know the limits on the government officer's power, not only when the contract covers the appropriation, but whenever other expenditures under the same act have been so made that the contractor could readily ascertain their total, as for instance, where contracts for constructing different parts of one public work are divided among several bidders.

§ 15. Cases Where the Validity of the Contract Is Questioned

The cases arising from the application of these restrictive statutes are generally found in one of two classes: (1) where there has been an express act of Congress directing the construction of a building or other specified work without restriction as to cost; (2) where the limit of cost is fixed by Congress in the act authorizing the contract.

§ 16. Where Limit of Cost Is Not Fixed

It sometimes happens that in an appropriation act express authority and direction is conferred upon the head of a department to enter into a contract for the erection of some public work and that the appropriation made therefor proves inadequate. The Supreme Court of the United States has decided that under such circumstances the power to contract still exists, even though the price to be paid exceeds the amount appropriated. But where neither express nor implied author-

ity may be found in the act, the head of the department cannot involve the government in an obligation to pay anything in excess of the appropriation. (*Bradley v. United States*, 98 U. S. 104 [1878].)

The application of these statutes is also discussed in the *Shipman* case (18 Ct. Cl. 138, 146 [1883]): "The liability in this case rests wholly upon the appropriation, and it is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work, without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or makes none at all. In such case the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the government to pay for it, and if a written contract be made and work be done in excess of the contract specification, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced."

§ 17. Statutes Fixing Limit of Cost

In those cases arising under acts which have expressly limited the amount to be expended thereunder, some interesting questions have arisen which can best be illustrated by certain decisions of the courts and opinions of the Attorney-General.

For instance, if during the progress of construction under a building contract so authorized and limited, alterations in and additions to the work are ordered by the officers of the government in charge of construction, the contractor cannot recover for such additional expense an amount in excess of the difference between the amount of the appropriation and

the cost of the building under the terms of the contract. In the case under discussion the expenditure was limited to \$300,000, and the claimant had received \$297,929.10. The value of the extra work was \$8,955, but the court allowed only the difference between the amount paid and the sum fixed by Congress, or \$2,070.90.

It was said in the opinion: "The statute became to the claimant notice in law and in fact that the expenditure could not be carried beyond certain bounds; and it was, moreover, by direct reference, stamped upon and made a part of the contract which is the foundation of the claimant's rights. This condition the law-making power never relinquished, nor by any act waived, nor at any time authorized the executive officer to exceed. The law-making power was here the government, and the executive officers were its agents, and no acts of theirs could bind their principal for a greater sum than had been consented to and agreed upon. . . . Were such statutory conditions to be disregarded, and were judgment to be given whenever a claimant should prove that he has done work or rendered service under the direction of an executive officer, it would enable the executive branch of the government, with the aid of this court to annul a law of Congress, and to throw down any limitation which Congress might impose upon the cost of our public works." (*Curtis v. United States*, 2 Ct. Cl. 144 [1866].) See also *Trenton Co. v. United States*, 12 Ct. Cl. 147 [1876].)

The decision of the court just quoted has been thought to be in conflict with that of the same court in another case (*Grant v. United States*, 5 Ct. Cl. 71 [1869]). But an examination of the facts show the cases to be in harmony. The *Curtis* case and the *Trenton Company* case were based upon a statute authorizing the making of a contract but in each instance placing an express limitation upon the cost of the work, while in the *Grant* case the limitation as to cost was to

be found within the provisions of the contract and was not directly based upon the appropriation bill. It appeared in this latter case that the contractor was directed by an agent of the department to furnish extra material and perform extra labor. As a result of his compliance the building was rendered more valuable and useful and was then accepted and used by the government. Although the contract price was the same as the amount appropriated for the building, the court held that the United States was liable in an action on an implied contract for the fair and reasonable value of the extra material furnished and for the extra labor performed.

In the Shipman case (18 Ct. Cl. 138 [1883]), the limitation as to cost was directly and explicitly stated in the provisions of the Appropriation Act, and therefore the claim for extra work was not allowed.

§ 18. Where Contracts Are Implied

As an implied contract was raised by the court in the Grant case, so also were implied contracts created by the court in two other decisions (*Semmes & Barbour v. United States*, 26 Ct. Cl. 119 [1891], and *Rives v. United States*, 28 Ct. Cl. 249 [1893]). These two decisions hold that the limitations in the statutes do not relate to implied contracts arising from the acts of public officers in the performance of their duty in carrying on the business of the government entrusted to them by law in their respective spheres. For instance, if in the performance of duties so imposed, the occupation of private property becomes necessary, the law raises an implied obligation to pay a reasonable compensation for such occupation and use, although there is no act of Congress expressly authorizing such contract or an appropriation for payment thereof.

Subsequent to these two decisions by the Court of Claims, however, the Supreme Court of the United States (*Chase v. United States*, 155 U. S. 489 [1894], affirming 44 Fed. 732)

has held that the Postmaster-General is within the prohibition of these statutes in so far as entering into a contract for the lease of a building for use by the post office is concerned, and that the general authority conferred by the Constitution of the United States upon the executive to establish post offices and post roads does not give the Postmaster-General the power to establish a post office "unless authorized by law, or under an appropriation adequate for its fulfilment." In the light of this decision the need of occupation should be imperative and the authority be necessarily implied by statutes. (See also *Hooe v. United States*, 218 U. S. 322 [1910].)

In fact so generally have these limitations of authority been recognized, that it is now customary for officers of the government not to enter into leases of premises desired for use of the government for terms of years, the appropriation for these purposes generally being made from year to year and for a year at a time. When an officer of the government, with authority conferred by an appropriation for payment of one such year's rental, enters into a lease of the premises which is to run a term of years at the annual rental specified in the act, the lease including a stipulation that payments thereunder subsequent to the first are subject to appropriation of Congress to cover the same, this is, of course, a recognition in the contract of the limitations imposed by these statutes. The contract is binding on the government only for the current fiscal year, with a future option from year to year until the end of the term. (*Bradley v. United States*, 98 U. S. 104, 114 [1878]; *Hooe v. United States*, 218 U. S. 322 [1910]; *McCollum v. United States*, 17 Ct. Cl. 92 [1881]; *Smoot v. United States*, 38 Ct. Cl. 418 [1903].)

To illustrate again: In the absence of any statute to the contrary, a government contract for a term of three years is not void though it extends beyond the official tenure of the secretary who made it. The period must be unreasonable and prejudicial.

The Supreme Court has had occasion within recent years to pass upon a case in which compensation was sought in excess of the amount appropriated by Congress for rent of a building, it being shown that a portion of the building, expressly excepted under the terms of the contract, had been used by the government commission occupying the remainder of the building. The court held, as shown by the syllabus, that:

"Congress, proceeding under the Constitution, declares what amount shall be drawn from the Treasury in pursuance of an appropriation.

"Heads of departments cannot by express or implied contracts render the government liable for an amount in excess of that expressly appropriated by Congress for the subject matter of the contract.

"A claim against the United States for a specific amount of money which is not expressly or by necessary implication authorized by a valid enactment of Congress cannot be said to be founded on the Constitution.

"When an officer of the United States takes or uses private property without authority of law he creates no condition under which the government is liable by reason of its constitutional duty to make compensation. If private property has been taken or used by an officer of the United States without authority of law the remedy is not with the courts but with Congress alone." (*Hooe v. United States*, 218 U. S. 322 [1910].)

The principle that authority or lack of authority to contract can or cannot be inferred from the nature of the office has been expressly defined by the Supreme Court of the United States. For instance, Congress having made no appropriation for the purpose, no officer of the United States is authorized to bind the United States by contract for subsistence of Indians and recovery may not be obtained for supplies furnished under

such an agreement, even though it be shown that the government has been much benefited. (*United States v. McDougall's Adm.*, 121 U. S. 89 [1886].)

§ 19. Authority May be Inferred from Duties of Officer

Although a public officer may not bind the government by contract unless authorized by law, such authority may be implied from the language of a statute imposing certain special duties upon him. (*Rives et al. v. United States*, 28 Ct. Cl. 249 [1893].)

Where the chief clerk of a mint accepted an offer to furnish metal for use by the government, it will be presumed in the absence of proof to the contrary that he acted with the consent and by the direction of his superior officer, the superintendent of the mint. (*Friedenstein v. United States*, 35 Ct. Cl. 1 [1899].)

SPECIAL RULES TO BE OBSERVED

§ 20. (1) Negotiable Paper Not Accepted

The subject of limitations on the authority of officers of the government was before the Supreme Court in the case of the Floyd acceptances, 7 Wall. 666 (1868). The court said: "The Secretary of War has no general or unlimited power to bind the government by indorsing or accepting negotiable paper," and an acceptance given by him "to contractors, upon whose contract no payments have become due, is either an advance upon the contract, or a loan of the public credit to the contractors, both of which transactions are prohibited by express acts of Congress and are illegal.

"The illegality of the transaction goes to the very foundation of the Secretary's authority. He cannot be the agent of the United States to do that which the laws of the United States expressly forbid.

§ 21. (2) Unauthorized Acts Cannot Establish Usage

“As regards usage, it must occur at once that if there are instances in which the use of bills of exchange by the officers of the government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, cannot establish a usage in cases not so authorized. It may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever by its frequency be made to stand as a just foundation for the very authority thus assumed.” This case settles the general principles and how these apply to particular instances will now be shown.

§ 22. (3) Appointment of Agent Must be Proved

“Where a party sells goods to one whom he alleges to be the agent of a quartermaster, and all of the allegations of the petition are traversed he must prove the appointment of both the quartermaster and of his agent.” (*Calkins v. United States*, 1 Ct. Cl. 382 [1865].)

§ 23. (4) Enemy Contracts Are Void

“No principle of national or municipal law is better settled than that all contracts with an enemy, made during war, are utterly void. This principle has grown hoary under the reverend respect of centuries.” (1 Gall. 563 [1813].)

§ 24. (5) Recitation of Facts Not Material Does Not Invalidate

A contract which an officer of the Treasury Department has lawful authority to make is not invalidated by reciting that it is made “by the direction” of the Secretary of the Treasury, who in fact had no authority to make it or to direct it to be made. (*Mudgett v. United States*, 9 Ct. Cl. 467 [1873].)

“When an executive regulation directs officers of one class to make a contract on behalf of the United States, it confers

no authority to make it upon officers of a different class, although employed about the same government business." (Headnote, *Camp v. United States*, 113 U. S. 648 [1885].)

§ 25. (6) Warning of Lack of Authority Has Weight

"An assurance by a military officer that if the claimant will render service and furnish supplies for bringing back Indians from Canada, pursuant to a policy adopted by both powers, the government will probably pay him a reasonable compensation, coupled with a warning that he, the officer, has no power to contract, does not constitute a contract, and service so rendered is not a legal demand." (Headnote, *Legare v. United States*, 24 Ct. Cl. 513 [1889].)

§ 26. (7) Refusal of Superior to Contract Binding on Inferior Officers

"The United States are not to be held responsible for the acts and declarations of persons in charge of the construction of the work in the making of contracts, either as express contracts or by the implication of law, in violation of the authority of their superior officers." (*Sprague v. United States*, 37 Ct. Cl. 447 [1902].)

§ 27. (8) No Implied Contract Exists Where Express One Would be Illegal

"An officer of the government has no power to bind the government by the acceptance of property where its purchase would be illegal. On the contrary such property could not be deemed to be received to the use of the United States." (*Reeside v. United States*, 2 Ct. Cl. 1 [1866].)

§ 28. Authority of Officer Rarely in Question

Considering the almost countless number of contracts entered into with officers acting for the United States, there

are very few instances in which there has been any question of the authority of the agent and most of those cases arose many years ago when purchasing officers were under less restraint and transactions of the departments were conducted in a less businesslike manner. Today printed forms are available for nearly all contracts, and these, filled in or, when necessary, changed to fit the peculiar subject matter of the agreement, and signed by the parties, evidence the contract made.

The more important contracts are made in and by the departments at Washington and under the direct supervision of men trained and expert in the work. As to these the contractor need only determine whether the contract itself is authorized, there being no doubt as to the authority of the particular agent of the government. But whether made at Washington or not, few agreements are now entered into by officers without reference to the department or branch thereof with which they are connected, in such manner as to make reasonable a supposition that the contracts are duly authorized.

Sometimes a branch of a department may receive from a proper source what may be termed a "procurement request" for the immediate purchase of designated materials. In these instances it frequently occurs that the order for the desired articles is placed with an establishment and filled before the written contract is drawn up and signed. In these cases the contractor takes some chance, his only precaution being an examination of the "request" referred to.

PART II
IMPLIED CONTRACTS

CHAPTER IV

WHEN A CONTRACT WILL BE IMPLIED

§ 29. Implied Contracts

Having considered the elements of appropriation and mandatory direction as entering into the authority of an officer to contract, there still remains that class of cases in which the appropriation of the property or the act done was seemingly without authority. Where recovery has been had in these cases it has usually proceeded on the theory of an implied contract, following in a general way the definition of such a contract as given in §8 of this book.

§ 30. Liability of United States for Tortious Acts of Its Officers

The Standard Dictionary defines a tort as a wrong or injury, an act such as assault, trespass, libel, giving rise to a civil remedy which is not an action of contract. An action in tort is a suit for damage for a wrong not arising from a contract, express or implied. A tortious act is a wrongful one, a tort.

No government has ever held itself liable to individuals for the misfeasance (trespass or wrong), laches (culpable neglect), or unauthorized exercise of power by its officers and agents, though "where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the government, are public and not personal. They inure to the benefit of, and are obligatory on the government; not the officer." (*Hodgson v. Dexter*, 1 Cr. 345 [1803]; cited in *Bank of Newbury v. Baldwin*, 1 Cliff 523, Fed. Cases No. 892 [1860]; *Thayer v. Wendell*, 1 Gall. 40, Fed. Cases No.

13873 [1812]; *Gillespie v. Wesson*, 7 Post. [Ala.] 461; *State v. McCauley*, 15 Cal. 457 [1860]; etc.)

"In the language of Judge Story; 'It does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interest.'" (*Gibbons v. United States*, 8 Wall. 269, 274 [1868].) And torts committed by an officer in the service do not render the government liable in an implied contract, even though the acts done were apparently for the public benefit. (*Whiteside et al. v. United States*, 93 U. S. 247, 257 [1876].) Thus threats by an officer that payment would be refused for part of a contract performed unless the contractor, who was absolved by breach upon the part of the government, agreed to complete it, would not justify a judgment for a greater sum than was payable under the contract. The threats were unwarranted; the contractor could have refused to perform and the government would have paid what it owed him. To have rendered the waiver of the breach and renewal of the contract void, the officer's actions and words must have been such as to overcome the presumption that the contractor renewed the agreement voluntarily. The supposition that the government will not pay its debts or do justice cannot be made the foundation for a claim of indemnity against loss incurred by an individual acting on such a suggestion.

§ 31. Fraudulent Taking by Officer and Recovery Therefor

But in the case of *United States v. State Bank*, 96 U. S. 30, 36 (1877), it was held, ". . . that it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot

be held by the United States against the claim of the wronged and injured party.

"The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal." (Affirming 10 Ct. Cl. 519 [1874].)

§ 32. Action for Wrong Done by Agent Not Maintainable Against Government

The law as laid down in these earlier cases involving redress for wrong has been reviewed in the case of *Bigby v. United States*, 188 U. S. 400 (1902), in which the plaintiff sought to recover damages for personal injuries received by him while entering an elevator located in a government building, such injuries resulting from the negligence of an employee of the United States. The plaintiff's contention was that the claim was founded upon an implied contract with the government, whereby it agreed to carry him safely in its elevator and to employ a competent person as operator. The court held that an action to recover damages for such injuries is necessarily one alleging tort against the government and therefore not maintainable in any court. After reviewing prior decisions the opinion goes on to say: "It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasances, or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule."

§ 33. When Acceptance Is Presumed and Recovery Allowed

The government is presumed to accept:

1. Where the object of sale was lawful and proper and Congress had authorized such purchase by general

appropriation and it would have been valid if made by the proper agents.

2. Where, though purchased by an unauthorized person, not the agent of the government, it was regularly and properly delivered to the officers charged with receipt of such property and was accounted for by them.
3. Where the property entered the actual use of the government and benefit was received therefrom.

These grounds for implying acceptance were formulated by the Court of Claims in the case of *Reeside v. United States*, 2 Ct. Cl. 1, 32 (1866). The court then added: "All of these facts may not be necessary to constitute a legal and binding acceptance on the part of the government, but existing I deem them to be conclusive." It was also held in the same case (page 32): "The power to bind the government by contract can only be exercised by those officers whom Congress has constituted its agents, either by the express words of the statute or by necessary legal implication; yet where a person has parted with his property for a lawful purpose, which has been received and used by the proper agents of the government, there the owner may recover for its actual value."

One further reference to this case may properly be made here. The syllabus reads: "The responsibility and discretion appertaining to the purchase of military supplies is vested by law in the officers of the Quartermaster's Department. . . . Therefore a commanding general cannot appoint a civilian purchasing agent of the government, nor invest him with discretion to make express contracts, nor transfer to him the responsibility which the law imposes on quartermasters. Neither has such an agent power to bind the government by express contract.

"Where the proper officers of the government receive services or property under a contract made by one who was not an authorized agent of the government, and they use it for a lawful purpose, so that the government derives a legal benefit therefrom, the contractor may recover the actual value of the property sold or service rendered."

It might be added that in some instances even though the government was benefited by the consideration, the contract will be held to be void. (*Filor v. United States*, 9 Wall. 45 [1869].)

§ 34. Caution Necessary as to Implied Contracts

In *Starin v. United States*, 31 Ct. Cl. 65 (1896), it was held that "the fact that the agreement recites that it is to carry out the provisions of an act of Congress, and that such an act may not be broad enough to cover it, will not invalidate it as a binding contract, if under any law, by express provision or necessary implication, or regulation made in pursuance of law" the officer had a right to make such an agreement. In the case of the *Floyd acceptances*, 7 Wall. 666, 676 (1868), the court after pointing out the duty resting upon those dealing with the government in the way of business, of seeing to it that its officers had power to bind it, said: "When this inquiry arises, where are we to look for the authority of the officer?"

"The answer which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.

"Our statute books are filled with acts authorizing the

making of contracts with the government through its various officers and departments, but in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law."

§ 35. Declarations of Emergency Must be in Writing

In a case where supplies had been purchased without the advertisement required by the Act of July 4, 1864, the court said: "It is entirely free from doubt that the Commanding General had no authority to declare an emergency except in writing, and that the declaration of General Thomas being verbal, there was no lawfully declared emergency in this case. We are of the opinion that contractors were equally bound to know this provision of law and this state of facts; and on the authority of Clark's case (95 U. S. 539 [1877]) we hold that while, in the absence of fraud, they could recover on a *quantum meruit* (as much as he deserved; measure of value received for work done where there is no contract as to compensation) the contract price on the executed part of their contract, they cannot make a contract entered into in violation of law the foundation for a recovery of damages for the unexecuted part of it." (Cobb *et al.* v. United States, 18 Ct. Cl. 514, 536 [1883].)

§ 36. Quartermaster Has No Authority to Contract for Indefinite and Uncertain Amounts or Quantities

In the case just cited the court said: "Contracts with the government invariably specify time and place of delivery, and furnish some measure for the amount to be delivered. We know of no law or no custom which ever authorized a purchasing agent of the government to clothe a contractor with a roving commission and to agree to take off his hands all he can buy."

CHAPTER V

WHEN A CONTRACT WILL BE IMPLIED (CONTINUED)

§ 37. What Makes an Implied Contract

In connection with another subject, that of formal contracts, implied contracts have been incidentally treated, but consideration will now be given to the subject as connected with the measure of recovery. A celebrated case decided by the Supreme Court, commonly called the "Clark case," will serve the purpose of illustration.

§ 38. The Clark Case

This was a case to which the law requiring that the contract should be in writing was applicable. The Quartermaster's Department by parol agreement hired a vessel and agreed to pay her value in case of loss while in the service of the government. The vessel was lost and payment therefor was refused. Suit was brought. The court held that, the parol contract being void, the United States was merely liable for hire upon an implied contract, and in the absence of negligence upon its part, not liable for the loss. The court, after announcing the conclusion, said: "We do not mean to say, that where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*." (Clark v. United States, 95 U. S. 539 [1877].)

Since the decision rendered in this case and in Langford

v. United States, 101 U. S. 341 (1879), the Supreme Court has had many of these implied contract cases before it. The more important of these decisions are here briefly referred to.

§ 39. When Private Property Is Used

In the United States v. Great Falls Mfg. Co., 112 U. S. 645 (1884), Congress having made an appropriation therefor, a dam was constructed across the Potomac River with the view of supplying the city of Washington with water. In the construction of the dam, certain lands belonging to the plaintiff were taken, although such lands were not by the act of Congress specifically ordered to be taken. The property so taken not having been paid for, plaintiff brought action in the Court of Claims to recover the value thereof. It was held that the action might be maintained upon the theory that although there was no express legislative authorization for taking the property, such taking was a necessary incident to the making of the improvements and the authority could be inferred.

Having thus decided that the acts of the officers of the government were free from tort the opinion further held: "The law will imply a promise to make the required compensation, where property to which the government asserts no title is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.' "

And in the later case of Great Falls Mfg. Co. v. The Attorney-General, 124 U. S. 581 (1888), which in a similar

way arose out of the same public work, the court said: "Even if the Secretary's survey and map, and the publication of the Attorney-General's notice did not in strict law justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon implied contract, it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded." In other words, the decision holds that the government having ratified the action of its officers by accepting and retaining the benefits derived therefrom, will not be permitted to avoid just payment upon the ground that the taking was without authority of law and that the action was therefore a tort and expressly excluded from the jurisdiction of the courts.

§ 40. Property Taken Without Occupation

Sometimes land has been subjected to government use without actually occupying it, as by the constant firing of heavy guns over it, and if this deprives the owner of its profitable use it will be a taking of property. The application of the Fifth Amendment to the Constitution to such a condition of facts has been interestingly discussed by the United States Supreme Court in *Peabody v. United States*, 231 U. S. 530 (1913).

The Court of Claims has repeatedly and justly held that the government, however illegal and void the contract, ought to pay the value of whatever was received and used by it under the contract. (See *Brooke v. United States*, 2 Ct. Cl. 180 [1866]; *Johnson v. United States*, 4 Ct. Cl. 248 [1868]; *Heathfield v. United States*, 8 Ct. Cl. 213 [1872]; *Belt v. United States*, 15 Ct. Cl. 92 [1879]; *Wilson v. United States*, 23 Ct. Cl. 77 [1888].

§ 41. Implied Contract Distinguished from Tort

All of the foregoing are cases in which the government admits that it has taken or received property belonging to the claimants and converted it to the use and benefit of the United States, or having acquired it for such purpose has negligently allowed it to be destroyed. As has been pointed out by the United States Supreme Court, however: "It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied." (*Langford v. United States*, 101 U. S. 341, 344 [1879] affirming 12 Ct. Cl. 338 [1876].)

§ 42. When Property Is Received and Used, Payment Due

It is also well settled that no implied contract arises from a mere voluntary service, it being a general principle of the law that no one may be forced into a contract against his will. If, however, goods voluntarily furnished are not returned or services voluntarily rendered are not disavowed there may arise a status in which the recipient is estopped from saying he did not agree to pay for them. (*Boston v. District of Columbia*, 19 Ct. Cl. 31 [1883]; 22 Ct. Cl. 265 [1887]; *Carroll v. United States*, 20 Ct. Cl. 426 [1885].)

"If the objection be made that the sale was invalid for want of previous advertisement, or because no 'exigency' existed within the intent of the statute, or for the reason that the goods were not purchased in open market; and if the court should so hold yet still it would appear that the defendants received the claimant's goods, that these were sold in good faith, that they went into the hands of the proper

officers of the government, and were used in the public service, and that from their receipt a public benefit was derived; and these facts being established, there would follow a legal right to recover a just and reasonable price. . . .

§ 43. Determination of Amount to be Recovered

"Nor would the measure of damages on *quantum valebat* (as much as its reasonable value; said of something sold and delivered without stipulation as to price) be different, for where the parties through a series of sales have paid and received a uniform price for the same goods, and where a high officer of the government, charged with the responsibility and supervision of such matters, as is the Quartermaster-General, has given his sanction to the transaction by paying the same price for the same goods to the same party, it is certainly sufficient evidence *prima facie* that the goods in the disputed bill were worth the price charged." (Livingston v. United States, 3 Ct. Cl. 131, 135 [1867].)

§ 44. Evidence of Contract

In a consideration of the decisions in the cases of implied contracts certain fundamentals requisite to recovery must not be lost sight of. If there is no positive evidence showing a "meeting of the minds," all evidence showing that the minds did not meet must at least also be lacking. There must be no proof of a denial by the government of the claimant's title, or facts showing that compensation was not expected on the one side or intended on the other. And so must evidence be lacking which would prove the acts of the officer or agent of the United States to have been without authority and the taking therefore a tort.

§ 45. Recent Decisions on Implied Contracts

Among the more recent cases disposed of by the Supreme Court those of Russell v. United States, 182 U. S. 516 (1901),

and *United States v. Buffalo Pitts Co.*, 234 U. S. 228 (1914), show that there has been no departure from the principles laid down in the earlier cases.

In the very recent case of *Tempel v. United States*, 248 U. S. 121 (1918), the Supreme Court referred to the cases of *United States v. Lynah*, 188 U. S. 445 (1903), and *United States v. Cress*, 243 U. S. 316 (1917), which, like the case at bar, involved an incidental taking of, or injury to, land by the United States. It quoted from the former, as follows: "The law will imply a promise to make the required compensation, where property to which the government asserts no title is taken, pursuant to an act of Congress, as private property, to be applied for public uses"; or, in other words: "Whenever, in the exercise of its governmental rights, it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor." The court then laid down this further proposition: "In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort."

§ 46. Measure of Recovery

In these implied contract cases the question must, of course, arise as to the method of determining the value of goods supplied or services rendered and also as to the liability of the government for supplies received but not used. The following are illustrative:

Certain hay was left in charge of an army post commander, but without a valid express contract. Because of necessity or convenience, the hay was partly consumed by the army, partly wasted, and the remainder destroyed by natural causes. The court held that the government was properly charged with the value of all the hay except that which was destroyed by natural causes. The value was to be fixed according to its price at the time when received, not when used. (United States v. Gill, 20 Wall. 517 [1874].)

In another case, however, similar in its general character, in which the parties had failed to reduce their contract to writing as required by the law it was said: ". . . when the Quartermaster in charge receives of a person, corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may in the absence of other testimony, be presumed to be the price fixed in the voucher by the Quartermaster." (Saloman v. United States, 19 Wall. 17 [1873].)

In a more recent case in which there was an express contract, void because not in writing, which had been performed on both sides, it was held that the vendor could not recover on a *quantum valebat*, less the amount already paid. "The invalidity of the contract is immaterial after it has been performed. When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid, while executory; the transfer cannot be revoked or the terms changed. . . . The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods." (St. Louis Hay Co. v. United States, 191 U. S. 159 [1903], affirming 37 Ct. Cl. 281 [1902].)

CHAPTER VI

THE IMPLIED CONTRACT TO PAY FOR USE OF PATENTS

§ 47. Use of Patents Without Agreement with Owner

In several cases patentees brought suit to recover compensation for inventions which had been used by the government without express agreement with the owners as to their use or payment therefor. These were the cases of *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59 (1885); *United States v. Palmer*, 128 U. S. 262 (1888); and *United States v. Berdan Fire-Arms Co.*, 156 U. S. 552 (1895). Summing up the holdings in these earlier cases the court, in a very thoroughly considered opinion in the case of *United States v. Lynah*, 188 U. S. 445 (1903), said (page 464):

“The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns, is its gov-

ernmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand, . . . but the Constitution in the Fifth Amendment guarantees that when the governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

§ 48. When Property Is Appropriated, Compensation Is Implied

“The government may take real estate for a post office, a court house, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others.”

§ 49. Condition of the Law Prior to 1910

Since these earlier decisions of the Supreme Court dealing with the right of the government to appropriate the inventions of its citizens, the great industrial development of this country has rendered increasingly important the rights of citizens under the patents granted them by the United States.

Prior to the year 1910, as is apparent from the cases above quoted, reasonable compensation could be recovered for inventions appropriated by the government when an implied direction so to appropriate the article in question could be inferred from the authority or direction under which the proper officer of the government was acting. When no such

contract, however, could be implied the owners of inventions or ideas found themselves in a difficult and almost impossible situation, since if no implied contract could be raised the United States could not be impleaded in a suit for compensation.

Although no implied contract on the part of the government to pay for the use of an invention arises where officers of the government make and use articles designed by themselves which the patentee, the plaintiff in this case, claims embody his invention, the court, in dismissing the petition, did so without prejudice to plaintiff's right to present his claim for infringement of his patent under the Act of June 25, 1910. (*Farnham v. United States*, 240 U. S. 537 [1916].)

§ 50. Statutory Protection for Owners of Patents

The hopeless situation of the patentee who could not prove an implied contract was finally remedied by Act of Congress of June 25, 1910, 36 Statutes at Large 851, which provides in substance that when the United States uses an invention covered by a patent right and without license of the owner, the owner may recover reasonable compensation for such use by suit in the Court of Claims.

§ 51. The Act Protecting Patentees Construed

Several important cases arising under this statute have been decided by the Supreme Court. They are *Crozier v. Krupp*, 224 U. S. 290 (1912); *Brown v. Fletcher*, 237 U. S. 583 (1915); *Cramp & Sons Co. v. Curtis Turbine Co.*, 246 U. S. 28 (1918); and *Marconi Wireless Telegraph Co. v. Simon*, 246 U. S. 46 (1918). In the *Cramp* case it appeared that the contractor had obtained a contract for building navy destroyers and in the course of construction had used inventions belonging to another company. Suit being brought by the owner of the patent, the defendant sought to evade

liability by insisting that the specifications prepared by the Navy Department required the use of the plaintiff's engine—the subject of the patent—though no mention of the same was made by name. It appeared, however, that the contract with the Navy Department contained an express provision protecting the government against damage suits for infringement.

Whether or not the Supreme Court would have decided this case differently had not this express provision been in the contract does not clearly appear from the decision, but the writer having followed with care the hearing of this case and that of the Marconi case argued at the same time, is of the opinion that this statute means that unless the contract in express words requires the contractor to use a particular invention which the government expects to pay for, the contractor must use the invention subject to the rights of the owner as to compensation and cannot look to the government for protection in this regard. This seems also to have been the thought of the government officer who prepared Paragraph 14, Section 4, of War Department Supply Circular No. 88, but even with this paragraph relating to patent infringements in a contract the writer is of the opinion that the words "specifically prescribed" may be so interpreted by the courts that the contractor will still lack sufficient protection, unless the description of the patent be so specific, either by designating it by name of owner or otherwise in the contract, that an intention to use it and no other would be clearly shown.

CHAPTER VII

THE IMPLIED CONTRACT TO PAY FOR GOODS COMMANDEERED

§ 52. The Acts Giving Compensation for Goods Com- mandeered

Another phase of implied contracts and of the measure of recovery with regard to them is that of the commandeering of supplies for the government during the war, in the exercise of the right of eminent domain. As has been pointed out, this right has always existed, but where its use has not been directly authorized or cannot be reasonably inferred from the legislative acts, an officer seizing property is personally responsible. It was no doubt to remedy this situation that Congress passed several acts during the war, which are noted at length later on, authorizing commandeering. These acts in substance provide that the Secretaries of the Navy and of War may take possession of goods, fix just compensation for the same, and then, if the owner is not satisfied, he shall be paid 75 per cent of the amount so fixed and shall be entitled to bring suit in a United States district court, or in the Court of Claims for what he considers the balance due him. This right is exercised by the various purchasing agents of the two departments in question, and they are of course governed by the decisions of the courts and of the Comptroller of the Treasury.

§ 53. Appeals

It must not be overlooked that when, for instance, the Paymaster-General of the Navy has so fixed a price, an appeal can be taken from his action to the Secretary

of the Navy and also be taken to the Secretary of War in a like instance. The writer has found, however, in practice, that where the matter is of some moment an appeal to the secretary is sometimes of doubtful value, since if the question be a close one, officers of the government very naturally prefer a decision by the courts. A decision of a government officer can always be reversed by the courts and this might possibly cause a loss to the purchasing officers. Where the case is a close one, therefore, and the matter is of importance resort should always be had to the Court of Claims if the action of the department seems unjust.

§ 54. What Is Just Compensation?

The commandeering acts in question, those of March 4, 1917, and June 15, 1917, are even now creating difficulties which will ultimately have to go to the courts for decision and which are far too important to rest solely on the rulings of government officers, no matter how learned in the law these may be.

These commandeering acts use the words "just compensation" as the price which must be paid the owner of the property commandeered or seized, but to state clearly what is meant by these words, or rather to formulate a general definition to apply to all cases, is a very difficult matter. Broadly stated, "just compensation" means that price at which an owner is willing to sell although not compelled to sell, and at which a purchaser is willing to buy, although not compelled to buy. In the matter of condemnation of real estate it is not difficult to apply this rule and reach a satisfactory answer, since real estate is largely governed as to its value by local conditions and circumstances; but when attempting to fix just compensation for merchandise or other personal property it is not so easy. For instance, the Paymaster-General of the Navy holds that just compen-

sation means the market price prevailing at the point of commandeering. This might cause an actual loss to the owner of the property who might have purchased this property for sale in some other section of the country where the price would be much higher. The Supreme Court of the United States has in the case of *Monongahela Nav. Co. v. United States*, 148 U. S. 312 (1893), decided that just compensation is a full and perfect equivalent for the property taken, that is to say, compensation for the property and not the owner, this decision having been used in a case in which real estate was condemned.

§ 55. Just Compensation for Merchandise

In the matter of merchandise, strange as it may seem, no true guide exists in federal decisions as to this question during the Civil War, but since then a number of decisions afford some light as to what is meant by just compensation. In the case of *Wilmoth v. Harrison*, 127 Fed. 49, 53 (1904), it has been decided to be that price at which the owner can make himself whole by purchasing in a general market, while in *Marshall v. Clark*, 78 Conn. 9 (1905), in a well-considered opinion by Chief Justice Baldwin, it is stated that the ordinary measure of damages for a failure by a vendor of goods to deliver them as agreed is the difference, if any, between the contract price and their higher market price at the time and place agreed upon for delivery. While the case of *Bullard v. Stone*, 67 Cal. Rep. 477 (1885), is founded upon a California statute, yet that statute does not in any way affect the value of a decision as to market price and as a matter of fact business men can probably apply this decision more readily to their own particular cases than most other decisions. The court in this case said: "By the market value was meant the price or sum for which an equivalent could reasonably and fairly be purchased at or near the place where the property should have

been delivered, and within a reasonable time after failure to deliver."

Generally accepted market quotations, as contained in price lists, newspapers, trade journals, trade circulars, etc., have sometimes been admitted as evidence without proof of their accuracy (see 12 Am. & Eng. Annotated Cases, 129, note), but always when it has been shown that they have been based upon reliable sources of information. (Mt. Vernon Brewing Co. v. Teschner, 108 Md. 157 [1908]; *Sissons v. Cleveland, etc., R. R. Co.*, 14 Mich. 489 [1866].)

PART III
PERFORMANCE

CHAPTER VIII

ASSIGNMENT OR TRANSFER OF CONTRACT

§ 56. Prohibitory Statutes

Very early in the history of our government it became apparent to Congress that it was necessary to protect the government from the effects of assignments of contracts. The first act on the subject became known as Section 3477 of the Revised Statutes, and this was followed in after years by Revised Statutes, Section 3737, here under consideration. The first act above mentioned relates principally to assignment of claims, while the latter act was designed to enforce, and still has the effect of enforcing, competition among bidders, by removing an abuse which was caused by bidders submitting two or more bids through dummies. (See 19 Op. Atty. Gen. 186 [1888]; *Francis v. United States*, 11 Ct. Cl. 638 [1875].)

In a somewhat earlier decision, speaking with reference to Section 3737 of the Revised Statutes, the Attorney-General said: "Contracts are to be performed by those who make them and not to be the subject of traffic or transfer. It is, therefore, necessary that they should be made with those who, through their capacity, are competent to perform the service or, from their business, are able to furnish from resources that which they contract to supply." (15 Op. Atty. Gen. 226 [1877].)

Perhaps the even more forceful language of the Supreme Court (*Burck v. Taylor*, 152 U. S. 634, 648 [1894]) more clearly illustrates the meaning of this statute. The court said: "The government, in effect, by this section, 3737 Revised Statutes, said to every contractor, 'you may deal with

your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned, you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.' ” With these two decisions in hand it will be clear that if A himself bids on a contract and at the same time procures B to put in a bid with the intention of having the latter assigned to himself in the event of it being the lowest bid, such a transaction is clearly prohibited by the statute.

§ 57. Financing the Contract Is Not an Assignment

The courts have held that no formal, technical, or written transfer is needed to annul a contract under the provisions of this statute, but that a substantial transfer of the contract or interest alone is required. This, however, does not mean that a preliminary arrangement for the honest purpose of uniting capital to obtain the necessary means to fulfil such a contract, there being no intent to influence the bidding or to evade the responsibility of a public contractor, shall cause annulment. The Court of Claims has so decided (16 Ct. Cl. 434 [1880]), and this case is important in that it distinguishes between that state of facts and those cases in which the contractor was merely a nominal party who never himself performed or attempted to perform the contract, but so transferred it as to substitute the assignee in his place as the real party in interest throughout. The reorganization some years ago of the Bethlehem Steel Company, under which a new corporation was formed and continued to completion work on government contracts, might be said to be an assignment of the contract, but it was not so held. (6 Comp. Dec. 88 [1899].) From an examination of the facts in the case, it was clearly apparent that there had been no intention to take the contract in one name and then transfer it to another, as it appeared that the second corpo-

ration acquired all of the assets of the first and therefore took over the government contracts along with the others.

While there do not appear to be any federal decisions directly in point, yet in a Virginia case, a well-considered opinion, in which cases in the United States courts are cited, has held that a government contractor can pledge with a bank the payments that he is to receive under his contract and that a power of attorney constituting the bank as attorney in fact to collect these payments, is not an assignment coming within the provisions of Section 3477. The court in deciding this case seems to have given full weight to the reasons underlying the enactment of this statute and there would seem to be no good reason why such an assignment should not be recognized if honestly made for the mere purpose of financing.

§ 58. Partnership Changes Are Not Forbidden

Another phase of this question of financing government contracts so as not to come within the purview of this statute received the approval of the Supreme Court of the United States in *Hobbs v. McLean*, 117 U. S. 567 (1886). The court decided that articles of partnership which do not transfer a contract with the United States or any interest therein, but which are construed by the court to be an arrangement by which in consideration of money to be advanced and services to be performed by his associates, the contractor agrees to divide with them a fund which he expected to receive from the United States on a contract which he had not yet entered into, are not forbidden by the statute. The court said: "We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it

had to deal and might always know with whom it was dealing until the contract was completed and settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

§ 59. Agreement With Sureties Is Not Illegal

Nor is a contract with the government annulled by the fact that the contractor makes an agreement with one of the sureties on his bond to the government by which the surety furnishes the moneys necessary for the completion of the work under the contract and receives a part of the profits to be derived from it. (*Bowe v. United States*, 42 Fed. 761 [1890].) See also *Hardaway v. National Surety Co.*, 211 U. S. 552 [1909].)

§ 60. Assumption of Control by Receiver Is Not an Assignment

As is apparent from the decisions just quoted, the question of what constitutes an assignment is a somewhat difficult one to decide, but it must be borne in mind that the failure of the contractor and the taking over of his affairs by a receiver or by a trustee in bankruptcy is not an assignment. The Comptroller of the Treasury in an interesting decision (10 Comp. Dec. 159 [1903]), has made it plain that the sale of a contract by a receiver is a sale by the court and not an assignment. And the comptroller's decision in this regard has received the support of the Supreme Court in the case of *Bank v. United States*, 164 U. S. 227 (1896).

In the case of the *St. Paul & Des Moines R. R. Co. v. United States*, 112 U. S. 733 (1885), one railroad gained possession of another railroad by virtue of a judicial sale under a mortgage. The court held that as neither in the mortgage nor the terms of sale was there any description suf-

ficient to transfer the mortgagor's interest in the mail contracts with the United States, such transfer to the second railroad would come within the inhibition of Section 3737.

§ 61. Leases of Property May be Transferred

It frequently happens that the government leases property from its citizens, but such leases do not come within the purview of Section 3737, since the Supreme Court in *Freedman's Savings Bank Trust Co. v. Shepard*, 127 U. S. 494 (1887), decided some years ago that such a lease of real estate to be used for public purposes was not within the statute. The viewpoint of the court was that the lessor had nothing to do except to receive from time to time the rent agreed to be paid, and that a transfer for this purpose did not in any way invalidate the transaction for the benefit of a third party. (*Hawes & Co. v. Trigg Co.*, 110 Va. 165 [1909].)

§ 62. The Government May Recognize the Assignment

As a general proposition the government has the power to recognize the assignment, if it be such as would not relieve the original contractor to the government. Two of the leading cases on this point are: *United States v. Farley*, 91 Fed. Rep. 474 (1899); and *Dulaney v. Scudder*, 94 Fed. Rep. 6 (1899).

CHAPTER IX

ALTERATIONS AND MODIFICATIONS

§ 63. The Right to Alter

The right and necessity of making modifications in a written contract entered into after advertisement, is usually recognized in the contract itself. It is recognized also by the courts when the contract provision comes before them for construction. This right must be considered in connection with the statutes on advertising and formal writing and also in connection with the authority of the officer ordering or approving the change and the amount provided or limited by the appropriation made by Congress.

In a consideration of the relation of the first of these statutes to the subject, the purpose in requiring advertising must not be lost sight of, to wit, the securing for the government the benefit of competition in the submission of bids. It is then quite apparent that a modification which would bring into operation, in so far as its subject matter is concerned, substantially a new contract, would not be recognized as a valid exercise of the power. In such cases there should be a readvertisement. No hard and fast rule can be laid down, but the spirit of the statute should at all times be observed. (See cases in § 66.)

§ 64. Oral Modifications

The right to modify in writing a contract made in compliance with Revised Statutes, Section 3744, expressly providing for its modification, is undoubted. It is in approaching the question of the validity of modifications made orally that the application of this statute becomes important

and somewhat uncertain as well. It may well be asked at the outset of the discussion, whether in point of fact the statute applies at all. The Supreme Court has never so held either expressly or by implication, and in the case of *United States v. Barlow*, 184 U. S. 123, 136 (1902), the opinion contains this sentence: "It is certainly disputable if the requirement of the section applies to alterations, which may become necessary in the progress of work regularly conducted under contract." But this much may safely be stated, that an officer may orally waive the time limit, and after its expiration accept goods delivered under the contract, and that the government will be liable therefor (*Saloman v. United States*, 19 Wall. 17 [1873]); and also that an oral waiver of the time limit and an extension of time are effective in preventing recovery of a penalty provided in the contract in case of delay. (*Maryland Steel Co. v. United States*, 235 U. S. 451 [1915].)

§ 65. Need of Caution

If the requirements of Section 3744 do not apply, it necessarily follows that in so far as that statute is concerned there would be perfect freedom to order orally or consent to any modifications whether for the benefit of the United States or not. If the section is applicable it must be read in the light of its recent interpretation in the case of *United States v. New York & Porto Rico S. S. Co.*, 239 U. S. 88 (1915), where the court held that the object of the act is to furnish needed protection for the United States and may be waived by its proper officers. A careful reading of this decision and of others which have been referred to leads to this conclusion: If the statute applies, a modification, as well as a contract made in disregard of it, may be enforced by the United States, though not by the other party; if the statute does not apply, oral modifications are valid and bind-

ing; consequently, in view of the doubt that surrounds the matter, it would seem wise to have any substantial alteration evidenced by writing. (See cases in §§ 67, 68.)

The right to modify a contract as affected by an act which in express terms limits the amount to be expended on a work which is authorized is illustrated by the case of *Curtis v. United States*, 2 Ct. Cl. 144 (1866), to which the reader is referred. (See § 17.)

The effect of a lack of authority in the officer ordering or approving an alteration or modification is discussed in § 67 and the law is deemed applicable to such a situation properly laid down in the case of *Ferris v. United States*, 28 Ct. Cl. 332 (1893).

The cases which will now be referred to may throw some additional light on the subject.

§ 66. Changes Permissible Without Readvertisement

That the United States government has the same power through the heads of its executive departments and their officers and agents to alter or modify the terms of a contract that a private individual has, has been decided by the Comptroller of the Treasury. (2 Comp. Dec. 182 [1895].) The heads of the executive departments may act for themselves in such matters or may specially delegate their authority. Experience having shown that it frequently becomes necessary to make changes or modifications in plans and specifications for public work after the contract has been signed, it is customary to insert a clause in reference thereto. It might, of course, be said that strictly speaking such a change or modification operates to bring about a departure from what was advertised in the proposal, that thus the bidders are not put upon equal terms and in consequence to a limited extent the beneficial object of advertising is impaired. But in an opinion given to the Secretary of War it was stated by the

Attorney-General: "That a modification where the interests of the government will not be prejudiced or any statutory provisions violated thereby may well be provided for in every contract to which the government is a party; and that a contract so modified is not such a new contract as must be preceded by an advertisement for proposals from bidders." (21 Op. Atty. Gen. 207, 211 [1895].) Where, however, after advertisement a contract was entered into for furnishing stone for use in a building, and this was the only article contracted for, it was held that the authority to modify did not extend to substituting marble for sandstone. In such circumstances there must be readvertisement. (See *Schneider v. United States*, 19 Ct. Cl. 547 [1884].)

§ 67. Approval of Officer Designated in Contract Required

Where contracts provide that changes or modifications must be agreed to in writing and approved by the departmental head, the engineer or other officer in charge of the work has no right to order extra work under a promise of compensation. The Court of Claims has thoroughly discussed the public policy governing such a state of facts, and as the decision is of value it is here quoted at length:

"No implied obligation can arise against the United States because of the performance of the work by the claimant under the assurance of the officer in charge. The responsible parties, having in charge the making of such agreements, and having alone the power to change, are not presumed to be cognizant of the conditions upon which the work was done. The recognition of an implied obligation to pay what the work was reasonably worth would be a most dangerous implication against the rights of the public in placing them within the power of every agent who is in any way connected with the public service. The law and public policy have entrusted certain officers with responsibilities and powers, and parties

dealing with the government must deal with them, and not with agents having no discretion or right beyond a mere executive duty. The officer in charge simply represented the government to the extent of superintending the performance of the work, and had no power or discretion beyond the limit of that duty.

“. . . . Aside from the question as to whether the statute requiring certain contracts to be in writing is directory or mandatory there is involved in the case a far more material and important question; and that is whether the right and power of the Secretary of War and the Chief of Engineers in contracts of this kind can or may be superseded by the acts and agreements of the officer in charge.” (*Ferris v. United States*, 28 Ct. Cl. 332, 343 [1893].)

This rule of law has received the approval of the Supreme Court even where in so ruling the court felt that a hardship was imposed on a contractor. (*Plumley v. United States*, 226 U. S. 545 [1913].)

Furthermore, if a contract provides that any changes must be in writing and approved by a superior officer, the contractor's acceptance of the verbal assurance of an engineer in charge that increased compensation will be allowed will not bind the government, even though it was benefited thereby, such assurances being wholly inoperative and void. (*Hawkins v. United States*, 96 U. S. 689 [1877]; *Ferris v. United States*, 28 Ct. Cl. 332 [1893]; *McLaughlin v. United States*, 36 Ct. Cl. 138 [1901].)

§ 68. Changes by Proper Officer Valid as Implied Contracts

But where the changes are verbally ordered by an officer having proper authority, his actions will be construed as a waiver of the provision requiring alterations or additions to be in writing and the cost agreed upon before they are made. Under such circumstances a contract will be implied to pay

for such benefits as the government has received. (*Barlow v. United States*, 35 Ct. Cl. 514 [1900]; 184 U. S. 123 [1902].)

A contract will be implied, also, in a case where the approval of some other officer is not required, if items not called for by the specifications, or changes in plans are ordered by the officer in charge for the United States, which necessarily imply an increased price. (*Cooper v. United States*, 8 Ct. Cl. 199 [1872]; *O'Hare v. District of Columbia*, 18 Ct. Cl. 646 [1883]; *Driscoll v. United States*, 32 Ct. Cl. 41 [1896].)

Upon this theory of an implied contract, the contractor is entitled to compensation for the increased cost of labor and materials resulting from an order of the officer in charge changing the plans, even though the cost of the work is thereby made to exceed the amount of the appropriation and the changes and additional compensation have not been agreed to in writing as required by the contract, *provided* that the government has accepted the additional work and the act did not limit the cost. (*Grant v. United States*, 5 Ct. Cl. 71 [1869].)

The increased cost of the change which is required must, however, be shown. In a case in which a building contract called for sandstone and the structure was to be erected near a marble quarry, it was decided that the contractor could recover if required to substitute marble for sandstone, only if it was shown that he was put to additional expense by the change. (*McFarran v. United States*, 39 Ct. Cl. 441 [1904].)

§ 69. Changes Must be Agreed to by Both Parties

Neither party can make alterations in a contract without the express or implied consent of the other, but if the party required to make the alteration does so without protest and

then accepts payments and gives receipts in full in accordance with the terms of the contract so altered without making any complaint, he thereby ratifies the alterations and will be bound thereby. (*Martin v. United States*, 5 Ct. Cl. 215 [1869]; *Peck v. United States*, 14 Ct. Cl. 84 [1878].)

If, however, an agreement is not entirely clear in its terms, and an officer of the United States orders the contractor to do work which the court holds could not have been intended under a reasonable interpretation of the contract, the contractor may receive his additional expense even though he made no objection to the added performance. (*United States v. Gibbons*, 109 U. S. 200 [1883].) If the contractor refuses his assent to changes ordered, he may recover the increased expense to which he is put in making the alterations. (*Dale v. United States*, 14 Ct. Cl. 514 [1878].) His consent is presumed—unless he makes objection—if the change ordered is of such a nature that the officer in charge might reasonably suppose no additional expense would be caused; but not presumed where the change would necessarily add to the cost. (*Dale v. United States*, 14 Ct. Cl. 514 [1878]; *Ford v. United States*, 17 Ct. Cl. 60, 79 [1881].)

Under another contract a superintendent was authorized to order changes at prices agreed upon with the contractors in advance. They refused to accept a price which he fixed for certain alterations, but offered to make them at cost. The court held that if the superintendent allowed them to proceed in that understanding they might recover for such added expense. (*Merchants Ex. Co. v. United States*, 15 Ct. Cl. 270 [1879].)

Delays resulting from changes in plans, or alterations ordered by the government cannot be taken advantage of by it, as by refusing to accept goods delivered after the contract time has expired. (*Amoskeag Mfg. Co. v. United States*, 17 Wall. 592 [1873].)

§ 70. Rulings as to Extra Work

The principles which govern in actions to recover for alterations and changes apply also, in most instances, to claims for extra work. A few of the more important rulings are here referred to.

The contractor is entitled to recover for extra work necessarily done at the direction of the officer in charge for which the government received the benefit. (*Ford v. United States*, 17 Ct. Cl. 60 [1881]; *Haldiday v. United States*, 33 Ct. Cl. 453 [1898].) But the extra work must be done in an expeditious and economical manner (*Union Transfer Co. v. United States*, 36 Ct. Cl. 216 [1901].) Extra work done by the contractor on his own motion, and not at the request or order of the government, does not entitle him to additional compensation. (*Kingsbury, Adm. v. United States*, 1 Ct. Cl. 13 [1863]; *Murphy v. United States*, 13 Ct. Cl. 372 [1877]; *Merchants Exc. Co. v. United States*, 15 Ct. Cl. 270 [1879].) The contractor must always assure himself that orders for extra work are issued by the officer authorized to give them, since extra work not properly authorized cannot be recovered for. (*Kingsbury, Adm. v. United States*, 1 Ct. Cl. 13 [1863]; *Barlow v. United States*, 35 Ct. Cl. 514 [1900]; *The Phoenix Bridge Co. v. United States*, 38 Ct. Cl. 492 [1903].) But the authority will sometimes be implied. (*Cooper v. United States*, 8 Ct. Cl. 199 [1872].) In this connection, if the contract provides that the approval of some particular officer must be obtained before extra work is undertaken, the contractor cannot recover for extra work done without such approval, even though the additional performance was ordered by the officer in charge of the work. (*Dale v. United States*, 14 Ct. Cl. 514 [1878]; see also 24 Ct. Cl. 122 [1889]; 34 Ct. Cl. 508 [1899]; 38 Ct. Cl. 649 [1903].)

Although the contract may provide that agreements for

extra work must be in writing if any claims therefor are to be allowed, it has been held that the requirement may be waived by the oral agreement of the parties, or a contract for the extra work may be implied from the conduct of the parties. (Ford v. United States, 17 Ct. Cl. 60 [1881].)

Questions sometimes arise as to whether work done which is not expressly called for by the contract is properly charged for as extra work. Two or three examples may be cited. Where a contractor was required to furnish and set curbstones he cannot recover for hauling them to the site (O'Hare v. District of Columbia, 18 Ct. Cl. 646 [1883].) After acceptance of payment at a certain price per cubic foot for constructing a wall, the contractor could not recover additional compensation for the incidental excavations. (Shipman v. District of Columbia, 18 Ct. Cl. 291 [1883].) But in the same case it was held that the contractor could recover additional compensation for a lining of gravel placed in the rear of the wall, work which was required by the contract without mention of compensation.

§ 71. Contractor Should Record Extra Costs

The contractor should of course keep an accurate account of the expense connected with extra work where it is not covered by express agreement as to price, notwithstanding the fact that in the case of Harvey v. United States, 113 U. S. 243 (1885), the court accepted as correct the value placed on the extra work by experts called by the contractor.

CHAPTER X

CONTRACTS FOR UNCERTAIN QUANTITIES OR INVOLVING UNKNOWN CONDITIONS

§ 72. The Effect of Uncertainty

Much litigation has arisen from that class of contracts—both for supplies and public work—in which there is an element of uncertainty as to just what the contractor may be called upon to do or the government be required to receive or pay for. In the case of supply contracts the trouble most frequently arises from the use of such expressions in the contract as “more or less,” “in such quantities not exceeding” so much, “and at such times as may be required,” or “as may be necessary.”

The Supreme Court had occasion to pass on a contract of this class in the case of *Brawley v. United States*, 96 U. S. 168 (1877), and the author cannot do better than quote from the opinion in it. The facts in the case showed that an agreement was entered into between the United States and a contractor, whereby the latter undertook to deliver at a certain army post, 880 cords of wood “more or less, as shall be determined to be necessary by the post-commander.” The post-commander, as soon as the contract came to his knowledge, and within four days after it was signed, notified the contractor that but 40 cords of wood would be required and forbade his hauling any more to the government yard. It further appeared that prior to the making of the contract the Quartermaster’s Department had advertised for proposals for furnishing “880 cords or more,” that the claimant’s bid had been accepted and that thereupon and before the signing of the contract he had proceeded to cut, and in fact had cut, the 880 cords called for

by his bid. The court having determined that the written contract merged all prior negotiations and was presumed to express the final undertaking of the parties, proceeded:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

§ 73. The Phrase "More or Less"

"But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

"If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the

quantity named will depend upon his discretion and requirements, so long as he acts in good faith."

As to the case before the court it was held that the United States was not liable to the contractor for any number of cords beyond the 40 delivered. Why? Because the written contract, assigned, provided that the post-commander should make the final decision as to amounts. (See also *Inman Bros. v. Dudley & Daniels Lumber Co.*, 146 Fed. 449 [1906].)

Sometimes the contractor is to furnish for a stipulated lump sum the quantity of an article necessary to do a certain piece of work, and an estimate or approximation of the quantity or number is made in the specifications. It would seem that under such a contract, slight variations in the quantity necessary for him to supply would not entitle the contractor to additional compensation. Where, however, he is required to furnish a quantity grossly in excess of that estimated and where the facts are such as to indicate that the quantity named was the only basis of the bid and further that no intelligent bid could have been made on any other basis, then additional compensation should and would be allowed. (15 Comp. Dec. 272 [1908]; *id.* 683 [1909].)

§ 74. Permissible Variation in Quantity

No definite rule can be laid down to determine just how much variation from the amount stated in a contract is permissible when the amount is qualified by the words "about" or "more or less." That the variation must be slight or accidental has already been shown. In the case of *Moore v. United States*, 196 U. S. 157, 168 (1905), it was held that under a contract for the purchase of "about 5,000 tons" of coal, the United States after accepting 4,634 tons could not refuse to receive and pay for the remaining 366 tons which were tendered, the court holding that the difference between the quantity accepted and that stipulated in the contract was

too great to be permitted. Many cases were cited to support the view taken.

§ 75. "Such Quantity as May be Required"

The contractor must not overlook the fact that although the United States is not required to take the quantity stipulated in a supply contract where it is qualified by such phrases as "or such quantity as may be required," yet he must at all times be ready to furnish the quantity specified in the agreement at such period or dates as there provided. The officer of the government having exercised in good faith the discretion vested in him as to the amount "required" or "necessary," the contractor will be bound thereby. But the discretion of the agent of the United States must, of course, be exercised in a reasonable and not arbitrary manner. (Clark v. United States, 1 Ct. Cl. 243 [1865], and 7 Ct. Cl. 32, aff'd by U. S. Sup. Ct. [1867]; Collins v. United States, 35 Ct. Cl. 122 [1900].) In the event of a controversy as to the quantity delivered, the burden is on the contractor to establish his contention as to the correct amount. (Mitchell v. United States, 19 Ct. Cl. 39 [1884].)

§ 76. Application of Rule to Building Contracts

The rule is quite properly somewhat different in the case of building contracts where the contractor agrees to furnish labor or certain material "as may be required," it being held that this language in the contract would protect the United States against claims of damages for delays incident to the work, unavoidable accidents, etc., but did not confer upon the government the right to suspend the work for long or indefinite periods because of doubts arising as to the desirability of completing the building according to plans or in the location selected. (Mueller v. United States, 19 Ct. Cl. 581 [1884]; 113 U. S. 153 [1885].)

§ 77. Uncertainty Regarding Conditions to be Encountered

Somewhat analogous to these agreements in which an indeterminate quantity of supplies is to be furnished, is that class of public work contracts in which uncertainties regarding conditions to be encountered are present and as to which the amount of labor to be expended or of material to be furnished can only become known as the work progresses. These unknown or surprise elements are most frequently met with in dredging operations and in excavations prerequisite to the erection of buildings or other public work. A few of the cases decided by the courts, which will be given as illustrative, will outline the general principle underlying this class of contracts.

§ 78. Rule as to Measurement in Building Embankment

In the early case of *Clark v. United States*, 1 Ct. Cl. 246 (1865); 6 Wall. 543 (1867); 4 Ct. Cl. 148 (1868), a contract "to furnish all the material and make 221,000 cu. yds. of embankment at the Navy Yard, in such manner and place as shall be directed," was before the courts for construction. In consequence of the fact that the contractor was required by the engineer in charge to dump his cars in running water, together with other circumstances surrounding the work, there was considerable waste and shrinkage of the embankment while building. The system of measurements pursued by the officers of the United States was the one customarily used on public works and consisted in measuring from a fixed base monthly. As a result the claimant was not compensated for any of the material lost by shrinkage, etc. Suit was brought and the case reached the Supreme Court, where it was reversed. On retrial the Court of Claims thus interpreted the rule laid down by the Supreme Court (see 4 Ct. Cl. 154 [1868]). The syllabus is here quoted:

"Where a contractor agrees to build an entire embank-

ment on dry land, the ordinary waste and shrinkage must be borne by him; but where he agrees to build it in such manner and at such place as the other party may designate, and the latter compels him to dump loose earth in running water, and to carry on the work in a place where it must of necessity be destroyed in whole or in part, then the contractor is not limited to the earth that remains visible and capable of being triangulated after the work is finished, but may recover for the quantity of earth delivered, less the loss by shrinkage, which would occur were the embankment built in an ordinary place and amid ordinary circumstances."

**§ 79. Representations as to Conditions, Without Warranty,
Not Binding**

In another contract for the building of a dry dock there was imposed upon the contractors the duty of constructing a dry dock according to specifications upon a site which the United States was to designate as "available." An officer of the United States had made borings on the intended site and the results thereof had been charted. The chart, indicating stable subsoil throughout, had been shown the claimant before his bid was made, but there was no reference in either the contract or the specifications to the chart nor to the character of the soil. After the work had begun a stratum of quicksand was encountered which resulted in much additional expense to the contractor for labor and material. No claim for extra compensation was made at the time, but suit was later brought in the Court of Claims to recover the amount of these additional expenditures. On appeal to the Supreme Court, that court stated "that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation." The court held accordingly, that as neither the contract nor specifications con-

tained "any statement or agreement or even intimation that any warranty, express or implied, in favor of the contractor was entered into by the United States concerning the character of the underlying soil, the judgment of the court below denying recovery should be affirmed." (*Simpson v. United States*, 172 U. S. 372 [1899]; 31 Ct. Cl. 217 [1896].)

§ 80. Specifications Are Binding

Statements made in specifications, however, are binding. If the specifications recite, for instance, that the soil to be removed by a dredging operation is of a described composition, it is a warranty by the United States as to the character of the material to be removed, and the fact that agents of the claimant made an examination to ascertain the character of material did not waive the representation or warranty made by the defendants and forming an essential and vital portion of the contract. Being protected by the provisions of the specifications, the contractor was under no necessity to determine for himself the correctness of the statements there made and his failure to do so could not prevent recovery. Of course, if the real character of the material had been plain and obvious, the contractor would be bound thereby, the warranty under those circumstances not becoming operative. (*The Atlantic Dredging Co. v. United States*, 35 Ct. Cl. 463 [1900].)

§ 81. Contract Provisions Control

As to quantity and conditions the provisions of the contract control. A contract provided that payment for dredging and rock excavation included therein should be made, at a unit price per cubic yard measured in place, upon estimates of the material removed made from an "original survey" of the area to be dredged which antedated the contract. A subsequent survey of said area, made by the government after the date of the contract and prior to the commencement of the work with-

out the contractor being a party thereto, showed that a quantity of material had been washed out by natural causes. Nevertheless, it was held, both parties to the contract were bound by the condition of the area as shown by the original survey designated and referred to in the contract, and the government was not allowed to take advantage of the decrease in the amount of material shown by the second survey; accordingly the final estimates of the material removed were made from said original survey and not from the second survey. (15 Comp. Dec. 272 [1908].)

§ 82. Measurements Are According to Custom

In a contract for laying a sewer it was provided that the contractor should be paid a certain price per cubic yard for excavations. At the time the agreement was made and for a considerable period prior thereto, it had been the custom of engineers employed by the District of Columbia, the defendant in the case, to measure the excavation by an arbitrary rule or constant without regard to the actual quantity of earth removed. With this practice in mind, the contractor dug a trench in such a way that the earth actually removed would be less than that paid for under the prevailing system of measurement. Before his excavation was measured the engineering authorities established a new rule by which claimant's allowance was greatly diminished. The court held that, although under the terms of the contract the parties were to abide the measurement of the engineers, yet this was not conclusive, and that the claimant was entitled to payment according to the method of calculation in force when the contract was made. (*O'Hare v. District of Columbia*, 18 Ct. Cl. 646, 679 [1883].)

§ 83. Presumption of Law as to Excess Work

It may not be amiss to explain at this point that when it is impossible to determine whether work performed by the con-

tractor came within or was in excess of the obligation of his contract, the presumption of law is that it was required by the contract and the burden of proof is therefore on the contractor to show the excess if any exists. (See *Crocker, Davidson & Co. v. United States*, 21 Ct. Cl. 255 [1886].)

CHAPTER XI

TENDER OF PERFORMANCE

§ 84. When Tender Should be Made

To make an entirely lucid definition of "performance" is difficult. It would therefore seem better to illustrate what the term implies, and its underlying principles as applied to government contracts, by reference to concrete cases. If a contractor is ready and able to fulfil his contract and this fact is known to the officers of the United States, but he is unable to perform owing to some manner of default on the part of the government, his readiness constitutes legal performance and it is not necessary for him to make a tender of the articles he contracted to supply to the government. (*Cole v. United States*, 23 Ct. Cl. 341 [1888].) It is well, however, for a contractor to make a tender where it is possible to do so, even though the government be clearly at fault. The government will not then be in a position to make an issue of a lack of tender, a losing one though it might be. With this word of caution it should be stated, however, that other cases, such as that of *Moore v. United States*, 17 Ct. Cl. 17 (1881), make it unnecessary in instances to make a tender; and in all cases to which the United States is a party to a contract the same general rule of law, that the conduct of one party which prevents the other from performance is excuse for non-performance, is equally applicable. (*United States v. Peck*, 102 U. S. 64 [1880]; *Saylor v. United States*, 14 Ct. Cl. 453 [1878].)

§ 85. Reasons Excusing Tender

An early case (*Smoot v. United States*, 15 Wall. 36 [1872]), laid down the principle in regard to performance and

tender in a clear and explicit manner. There the reasons which will excuse a contractor from making a tender were summed up as follows:

1. Where the contractor is ready and able to perform, but the government has given him clear notification that it refuses to accept performance.
2. Where the government has placed itself in a position in which it would be unable to comply with its part of the agreement.
3. Where it has failed to provide an agreed-upon means of making performance by the contractor possible.

§ 86. When Tender Is Required

Readiness and ability to perform mean readiness and ability on the part of the contractor in his own particular case. Sometimes contracts, virtually identical in terms and in other respects, are made at or about the same time by the government with a number of contractors. A certain contractor may learn that contracts similar to his own have been suspended by the government under conditions or orders which would prevent his own performance. He may not assume, however, that the conditions actually apply to his own case, and that therefore tender is unnecessary. In other words, almost similar conditions are not to be taken as identical. What the contractor should do in such a case is to request a suspension of the order as applying to his contract. If he meets with a refusal tender is unnecessary. If he does not request a suspension of the order he should tender the delivery of the supplies.

It has been decided that where a contractor has tendered to the proper government official that part of the goods due for delivery to the government at that time, and acceptance has been refused, the contractor is relieved of the duty of tendering the balance of the same article and upon expiration

of the time of delivery fixed in the contract he may throw the goods on the government and seek the contract price, or may sell the goods to others and demand of the government the difference in price. If he elects to follow the latter course and ships his goods to an unusual and dangerous market or holds them for a better price it will be at his own risk, and, if because of their perishable nature loss occurs owing to the delay, he will be the loser. (*Hughes v. United States*, 4 Ct. Cl. 64 [1868].) Again, it frequently happens that building contracts are made which contemplate that the contractor should have pointed out to him defects in his work and be given an opportunity to correct them. Under such circumstances if he should leave his plant upon the work and await a reasonable time for such instructions his action is equivalent to a tender of readiness to perform. (*Kimball v. United States*, 24 Ct. Cl. 35 [1888].)

§ 87. Extension of Time of Performance

From the standpoint of the government the time for the completion of performance of a contract is to be reckoned from the date the contract is entered into and not from the date of its approval.

As a matter of practical application, it may be supposed that a contract was entered into on a certain date between an officer of the government and a contractor, subject to approval by the head of a department; and that it was to be completed in a given number of weeks from the date of the contract. Now it might very well happen that the contractor would view the probability of approval by the head of the department in the nature of an uncertain quantity and that therefore to be on the safe side he would not commence work on the contract until such approval was obtained. The Comptroller of the Treasury has held in 15 Comp. Dec. 277 (1908), that, there being no unnecessary or unreasonable delay in the

matter of approval, the actual time elapsing between the date of signing the contract and the date of approval will not thereby extend the time for completion by that number of days. This may seem unfair when it is remembered that in the absence of approval there would be no contract, and certainly differs in practice from the ordinary contractual relations between individuals, but the fact should be borne in mind by those who propose to deal with the government.

This situation can be, and in practice frequently is, guarded against when the parties provide in the guarantee accompanying the proposal that 60 days, or some other definite period, may be taken, in accepting the proposal and completing the execution of the contract. The government can under such conditions use the entire period of time in finally approving the contract and this will not constitute an unreasonable delay on its part, but on the other hand the proviso gives the contractor something tangible to go upon. (See 15 Comp. Dec. 812 [1909].)

§ 88. Express and Implied Extensions

Express extensions are usually evidenced by appropriate printed forms, but extensions can also be implied from the acts of the government.

§ 89. Acts of Government Constituting Implied Extension

For instance, if an article is in process of manufacture under a contract and the government orders an alteration requiring additional time, the order impliedly constitutes an extension of the time of delivery sufficient to permit of the alteration being made. (*International Co. v. United States*, 13 Ct. Cl. 209 [1877]; *Amoskeag Mfg. Co. v. United States*, 17 Wall. 592 [1873], reversing 6 Ct. Cl. 99 [1870].)

This is quite in accordance with other decisions holding that when the contractor is compelled to suspend for a part

of the period by acts or orders of the officers of the government, such acts or orders act as an extension of the contract time limit. It might be said in this connection that though there had been prior delays or defaults on the part of the contractor, if no notice has been taken of them by the officers and no forfeiture declared at the time of the extension, the government will become liable to him for damages which may result to him because of the stoppage of the work at the expiration of the time limit stated in the contract. (See *Ferris v. United States*, 27 Ct. Cl. 542 [1892]; *Gleason v. United States*, 33 Ct. Cl. 65 [1897]; reversed by 175 U. S. 588 [1889]; *Clark v. United States*, 6 Wall. 543 [1867].)

Sometimes the government actually prevents the commencement of the work even after formal approval of the contract. If it does, such default on the part of the government operates as a waiver of the time limit to the extent that the contractor should be allowed reasonable time in addition to that fixed in the contract, in which to complete the work.

§ 90. Unavoidable and Other Causes of Delays

It may be asked, what acts of the contractor are to be regarded as unavoidable and a basis for extension, in case the contract provides unavoidable delays as such a basis. If it be explained that errors of judgment do not constitute unavoidable delays it may be possible in some instances for the contractor to determine his rights as to such an extension. If the contractor is held back by the fault of his material man, as for instance, the inability of a steel corporation to furnish steel work to the contractor owing to the congested condition in its mill; and even if the same conditions apply in all steel mills in the country, still this is not an unavoidable delay in the light of the decision in *Link Belt Engineering Co. v. United States*, 142 Fed. 243 (1905), but is regarded as owing to an error of judgment. Sometimes the government prevents a

contractor from prosecuting work on a portion of his contract that he is ready to proceed with, while at the same time a contractor is delaying work on portions that he might go ahead with. The result is a mutual breach and no attempt will be made to apportion the delay. When, however, the causes of any particular delay may be determined and fixed as chargeable wholly to one or the other of the parties the delays will be apportioned and the time for the completion of the whole work arrived at by such apportionment. (16 Comp. Dec. 197 [1909].) This decision of the Comptroller which allows time for delays by the government does not permit the contractor to use this as an excuse for not going ahead on other portions of the work which he could have done independently of the acts of the government.

Perils of the sea do not excuse a contractor for his failure to perform a contract within the time specified nor serve as a basis for an extension unless the contract contains a stipulation to that effect.

§ 91. Rule of Law as to Time Limit

It is a rule of contract law that where one of the parties to a contract demands strict performance as to time by the other party he must comply with all of the conditions requisite to enable the other party to perform his part, and failure on the part of the one demanding performance to do all the preliminary work required of him to enable the other party to complete the work within the time limit, operates as a waiver of the time provision in the contract. If, however, under the terms of the agreement, the head of a department is the judge as to whether or not a delay has been caused by the government, the contract is not within the rule just mentioned.

CHAPTER XII

CONSTRUCTION OR INTERPRETATION OF CONTRACTS

§ 92. General Provisions

While, as has before been pointed out, the United States is not always bound by the same rules of law as would control a private individual or corporation in like circumstances, yet in the construction of contracts it may be truthfully said that the principles and rules applying to contracts in general are likewise applicable to government contracts. (*Hollerbach v. United States*, 233 U. S. 165 [1914].)

This similarity may require illustration. In one case a contract is amended at the request of an officer of the United States and for its benefit. The amendment was signed for the United States but not by the contractor. Its language being somewhat ambiguous, the court interpreted it against the interest of the government, because of the fact just stated and the further one that the view taken was in accord with the contemporaneous construction given it by the officer who suggested the amendment. (*Garrison v. United States*, 7 Wall. 688 [1868].)

The case just noted was followed in later years by another one, that of *Brawley v. United States*, 96 U. S. 168 (1877), where the court in its decision lucidly stated another rule of interpretation as follows: "Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract and the sense in which the party may have used particular terms, but not to alter or modify the plain language which they have used."

§ 93. Contracts Partly Written and Partly Printed

The following indicates the substance of certain decisions by the courts which will support the view that, in respect to the construction and interpretation of government contracts, rules of law applicable to private contracts are likewise applicable to government contracts. For example, take the case of a contract that is in part written and in part printed. The Supreme Court of the United States has held that in such a case the portion in writing will be deemed the more carefully considered by the parties and in case of conflict the more accurately expressing their intention.

§ 94. Construction by the Parties

The Supreme Court has said in this connection: "Where the terms of a contract are ambiguous, the parties may adopt such a construction as they expressly or by tacit concurrence agree upon, and after one of them has acted upon that construction, incurred expense, or done other acts on the faith thereof, the other party cannot set it aside and insist upon a different interpretation inconsistent therewith. It becomes part of the contract itself, in the nature of a new agreement, and is as binding as though it were one of the original provisions." (*Merriam v. United States*, 14 Ct. Cl. 289 [1878]. *aff'd*, 107 U. S. 437 [1882].) Again, a contract ambiguous in terms will be construed in accordance with the business interests of both parties. (*Aken v. United States*, 17 Ct. Cl. 260 [1881].)

Very important are the decisions in the two cases of *Otis v. United States*, 20 Ct. Cl. 315 (1885); and *Edgar Thomson Works v. United States*, 34 Ct. Cl. 205 (1899), in which it was held that the government can claim no more favorable rule of construction and interpretation than a private individual. These cases, that is to say, follow the law that where one party prepares a contract and the other merely signs it

and the language used afterwards proves ambiguous, the courts would give the benefit of the doubt to the side that did not prepare the contract.

§ 95. Other Rules of Construction

Among other rules of interpretation the following may be mentioned:

1. When a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. (*Hobbs v. McLean*, 117 U. S. 567 [1886]; *United States v. Central Pacific R. R.*, 118 U. S. 235 [1886].)
2. Doubtful expressions in a contract should be used against the party who uses the language. (*Chambers v. United States*, 24 Ct. Cl. 387 [1889]; *Simpson v. United States*, 31 Ct. Cl. 217 [1896].)
3. A general provision in a contract which requires a contractor to furnish everything necessary to make a building ready for use whether specified or not, will not prevail over a specific provision which requires him to supply a determined and stated number of certain articles. (*Erickson v. United States*, 107 Fed. 204 [1901].)
4. The practical construction which parties place upon the terms of their own contract and according to which the work was done will prevail over the literal meaning of the contract. (*District of Columbia v. Gallaher*, 124 U. S. 505 [1888], affirming 19 Ct. Cl. 564 [1884].)

§ 96. Correspondence a Guide to Correcting Ambiguity

Another interesting case in which a contract ambiguity was removed by correspondence is that of *Walker v. United States*, 143 Fed. 685 (1906). Here the claimant agreed to

furnish three wood-turning lathes for use at the Brooklyn Navy Yard, but there was no formal written contract. Being in some doubt as to the size which the words of his proposal required him to supply, he wrote a letter to the naval constructor at the yard, and the answer thereto gave him specific instructions. The claimant did not question the construction which the government thus put upon the contract, but built the machines as described and delivered them, accepted the price named in the contract, and gave his receipt in full. Later in a suit he made the claim that the naval constructor's letter was a modification of the contract and compelled him to furnish larger machines than the contract called for. In its opinion the court said in effect, that assuming the wording of the contract to be ambiguous, the ambiguity was removed by the letter which gave the plaintiff distinct notice of what the government expected of him, and that if he did not agree with that interpretation, he was bound to speak at once and refuse compliance with a demand which he considered unwarranted. Not having done so he could not afterwards change his attitude, but was bound by the construction of his proposal assented to by his unmistakable act and writing.

§ 97. Acts of Parties as Basis for Interpretation

In a rebuilding contract the specifications provided that "the foundations and the brick walls now standing," so far as they "were uninjured by the fire, will remain." Portions of the walls had been torn down by order of the government officers and prospective bidders had been invited to inspect those left standing. After claimant's bid had been accepted it was discovered that sections of the walls left standing were unfit for use. Those were also razed and the contractors rebuilt them at a much increased expense, along with the work originally contemplated. Additional compensation was refused by the government, whose officers claimed the work was en-

tirely covered by the contract, which has been quoted above. In deciding for the claimant the court said: "The foundation and walls themselves as left standing by authority of the proper officers, constituted under the circumstances a representation on the part of the United States that they had been adjudged to be so far uninjured by fire that they were to remain, upon the faith of which the intending contractor was entitled to rely for the purpose of estimating the probable cost of the work to be done." And in referring to the words of the contract it said: "The language of the specifications is perhaps susceptible of two meanings. But . . . we think the meaning of the parties explained by the circumstances attending the transaction is sufficiently plain, and determined satisfactorily their relative rights and obligations." (*United States v. Gibbons*, 109 U. S. 200 [1882].)

§ 98. Clerical Error Is Not Binding

The case may occur that a contract for furnishing machines and supplies contains an itemized list of the supplies and machines with a unit price for each article, that the total price at unit rates is carried to a column of totals, and that the contract provides for the payment of a lump sum made up of said totals. If in carrying out the total price of one of the articles, a clerical error should be made which is incorporated into the grand total that constitutes the lump sum stipulated to be paid, the unit price is controlling and the other provisions of the contract should be read and applied as they would have been written if no clerical error in carrying out the total of the unit prices had been made. (15 Comp. Dec. 31 [1908].)

§ 99. Contract and Specifications Irreconcilable, Contract Is Void

Where, however, there is irreconcilable conflict between essential portions of a contract for building and the specifica-

tions, and the latter cannot be ignored, the contract is void for uncertainty and is unenforceable. (*United States v. Ellicot*, 223 U. S. 524 [1912].)

The general rule may be said to be that in cases of doubt as to the meaning of language actually used, prior negotiations may sometimes be referred to, but it is not for the purpose of making a contract for the parties but to understand what contract was made that such prior negotiations may be referred to. (*United States v. Bethlehem Steel Co.*, 205 U. S. 105 [1907]; *Chambers v. United States*, 24 Ct. Cl. 387, 393 [1889].)

§ 100. Trade Usage or Custom

Where the language used is not plain or clear, the contracting parties may resort to commercial or trade usage to explain such ambiguity. (*Bowers Dredge Co. v. United States*, 211 U. S. 176 [1908]; 12 Comp. Dec. 420, 705 [1906]; 14 *id.* 733 [1908]; 17 *id.* 581 [1911].)

CHAPTER XIII

APPROVAL OF PERFORMANCE BY OFFICER OR BOARD OF SURVEY

§ 101. Right to Waive Contract Provision: Boards of Survey

Of the utmost importance to parties having dealings with the government are the laws and decisions applying to those contracts where certificates of approval of officers or inspectors are required. Boards of survey are among the means used by the government to determine quantities and other conditions. Contracts, at the moment this book is being completed, have largely to do with subsistence, ordnance, and other matters of a like nature in connection with which boards of survey are often resorted to, rather than with the construction of public works not used for war purposes. While a contract may contain provisions for boards of survey, yet those provisions can be waived by the parties themselves and the contract will still be enforced in all other respects.

§ 102. Approval of Board Not Necessary for Recovery

A transportation contract contained, among many provisions and stipulations, one to the effect that the officer serving at the place of consignment should give receipts on the bills of lading for the full quantity of stores delivered and that payments should be made thereupon as further provided. Another provision stated that the indorsement of the officer should be in accordance with the finding of a board of survey reciting quantity and condition of goods received and that deductions should be made for lost or damaged articles.

In the performance of the contract, boards of survey were never called for by either party except in the case of lost or

damaged goods. The claimant, not being paid in full, brought action for the balance, the defendants insisting that a finding by a board of survey was a condition precedent to a recovery.

In awarding judgment for the contractor, the court made these statements: "Well-settled principles established that the objects designed to be attained by the parties to written agreements shall be taken into consideration in the interpretation of the meaning, application, and effect of the language used, and that such a reasonable construction shall be given to the different provisions and different parts as will most effectually carry out the real intentions without doing injustice or injury to either party." In discussing the failure of the parties to call for a board of survey, the court continued: "When the direction, instruction, or condition, if it can be so called, was neglected or waived by the defendant's own officers charged with the duty of receiving the stores, because they found the quantity correct and the supplies in good order and condition, and so indorsed the bills of lading, no questions arising as to loss, damage, deficiency, or delay, it would have been practically a useless and idle ceremony. . . . Had such a board been considered necessary in any instance it might have been called by the defendant's officers without a request from the claimant; and it appears that a board was in fact convened in every one of the cases in which damages of any importance were claimed at the time of delivery, . . . and it is reasonable to conclude that to avoid the trouble, expense, and inconvenience . . . they gave the required receipts and made the indorsements in good faith, without the intervention of a board in such cases, and thereby induced the claimant to believe that he need not make application therefor.

"Upon the whole case the controlling facts are simply these: The claimant has performed the services and they have been accepted by the defendant's officers. Some technical omissions in certain proceedings, not the essence of the con-

tracts, have been made mostly by the defendant's officers, and wherein made by the claimant those omissions have been treated as unimportant, assented to, or waived by those officers at the vital point of time when they should not have been passed by in silence, if intended to be insisted upon, and above all the defendants have suffered no loss or damage on account thereof." (*Braden v. United States*, 12 Ct. Cl. 164 [1876].)

§ 103. Decision of Board, if Invoked, Is Final

While the provisions of a contract as to the findings of boards of survey and similar boards can be waived by the parties by their own deliberate acts, as has just been shown, yet if nothing has happened which could be construed as in the nature of a waiver then either side can call into action the provision providing for the appointment of such a board. When this board has made its decision it is binding on both parties and on the courts, particularly if the contractor did not make known his objections to the report at the time it was made. (*Conners v. United States*, 141 Fed. 16 [1905]; *United States v. Shrewsbury*, 23 Wall. 508 [1874].)

In the case cited, which involved the construction of a contract for the erection of a foundry at a navy-yard, there was a provision which permitted the United States to make any changes or modifications which should prove necessary or desirable during the progress of the work. There was the additional provision that the increased or decreased cost arising from the exercise of this privilege should be assessed by a board of naval officers appointed for the purpose. The contract required the contractor to fireproof certain lumber used in construction. After work was begun it was decided that the wood called for by the contract would not be improved by such process and a board was appointed which assessed the resulting decrease in cost. It was held that this was a change or modification within the meaning of the contract;

and that the decision of the board was conclusive upon the contractor and the court.

§ 104. Decision of Designated Officer Is Binding

Identical in principle to the requirement as to boards of survey are those provisions which confer upon a designated officer the power to decide questions which arise during performance of the contract, or which require his approval of performance before settlement is made. The decisions of this officer may be set aside only when it can affirmatively be shown by the claimant that fraud, bad faith, or dishonesty entered into the decision or played a material part in bringing it about. The Court of Claims in one well-known case (*Kennedy v. United States*, 24 Ct. Cl. 122 [1889]), has stated this rule in much the same general terms, that is to say, that such a decision would not be set aside for a mere mistaken judgment not tainted with fraud, bad faith, or dishonesty. This rule has also received the same interpretation from the United States Supreme Court in the case of *Kihlberg v. United States*, 97 U. S. 398 (1878); and *Sweeney v. United States*, 109 U. S. 518 (1883), the latter case coming up from the Court of Claims, where it is to be found reported in 15 Ct. Cl. 400 (1879). The *Kihlberg* case involved a transportation contract in which it was expressly agreed that distances should be ascertained and fixed by the Chief Quartermaster. He fixed the distance by air line, which was less than by the usual and customary route, but the court refused to revise his action, upon the ground that the evidence did not disclose fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment.

§ 105. Agent's Judgment Must be Exercised Reasonably

The limitation on the conclusiveness of the agent's decision has been pointed out in the case of *Ripley v. United States*,

223 U. S. 695 (1912): The syllabus is as follows: "Where the power of the government over the contract is complete and its agent's decision is conclusive, a corresponding duty exists that the agent's judgment should be exercised reasonably, and with due regard to the right of both contracting parties; and in this case, as the Court of Claims has found that the agent's decision was a gross mistake and in bad faith, the contractor is entitled to recover the damages actually sustained by him by reason thereof.

"Where there is no provision in the contract for an appeal from the decision of the agent in charge, the contractor does not have to appeal to a higher officer from the decision of the agent whose judgment and decision is expressly made final by the contract.

"For the contractor to recover damages caused by an improper decision of the government's agent in charge, the burden is on him and the record must disclose the facts in this connection.

"Where the contract provides that the decisions of the engineer in charge are final, they are so in the absence of fraud or gross mistake implying fraud, and in the absence of a finding to the effect that there was fraud, the contractor cannot recover damages on the ground that such decisions were erroneous."

It should be pointed out, however, that the provision in the contract relating to inspection and acceptance and making the decision of the engineer in charge conclusive as to the quantity and quality of the work does not apply to the daily determination of matters varying from day to day.

§ 106. Government Is Bound by Decision of Its Officers

Government inspectors or superintendents of construction are frequently recalled or transferred, and work passed or approved by their predecessors often fails to satisfy the new

appointees. The question naturally arises, may these new officers set aside the approval already given and require the contractor to change the work in accordance with their ideas? As will be apparent from a reading of the facts and the decision of the court in the case of *Moore v. United States*, 17 Ct. Cl. 17 (1881), this right does not exist where there has been no fraud shown or unless it is expressly reserved in the contract. The case referred to concerned a contract for supplying bricks and providing that their acceptance was subject to the approval of the superintendent acting for the United States. A portion of the number contracted for was delivered and accepted. The government then sent out an inspector to examine the building, and upon receipt of a report from him by the Treasury Department that the bricks were of an inferior quality, cancelled the contract. The contractor sued to recover prospective profits. The court found that although the bricks might have been of bad quality, they were furnished by the claimant without fraud, misrepresentation, or concealment and that, as the agreement provided that they were to be subject to the approval of the superintendent, he was the responsible judge and the government was bound by his decision. The remedy of the United States under the circumstances lay in employing a competent superintendent who would insist that material of proper standard be supplied.

§ 107. The Inspection Officer Should be Clearly Designated

The particular point that is to be observed in this question of finality is whether the language of a contract limits the supervision to one officer or provides for or permits a change in the inspection officer, and makes necessary the approval of the officer on duty at the time. The importance of so determining the language of the contract in this regard was shown in the case of *Barlow v. United States*, 184 U. S. 123 (1902), wherein the contract provided that all labor and

materials "shall be of the best kind and quality adapted to the work, and subject not only to the approval of the engineer at a particular time, but also to that of any engineer subsequently appointed." The contractor laid certain foundations and they were approved by the engineer in charge. Later there was a change of supervision and the new engineer disapproved of this same work and required the contractor to entirely rebuild it. Since the Supreme Court decided against the contractor and held that the claimant was not entitled to recover for the extra work and expense thus rendered necessary, the importance of understanding thoroughly inspection provisions of a contract before executing will be obvious. It may not be amiss at this point to examine several decisions of the court bearing on the inspection officer, including this Barlow case.

§ 108. Certificate of Approval Necessary to Recovery

Under the terms of a transportation contract, payments were to be made upon presentation of certificates issued by a certain officer showing performance. A claim was presented for services not so certified. The court held that as the contract required a certain kind of evidence to prove performance, the party seeking to enforce the agreement must show that he had done everything possible on his part to give it effect, and that as no proof was offered that application had been made to the proper officer for the required certificates and that he refused to give them, nor any other excuse made to explain the failure to produce them, the claimant would not be permitted to introduce other evidence of services rendered. (United States v. Robeson, 9 Pet. 319 [1835].)

§ 109. Approval Not to be Given in Advance of Acceptance

A contract for building a dock contained a provision which required all stone used therein to be of a quality approved by

the engineer in charge or such other competent person or persons as might be designated. The engineer visited the quarry from which the stone was to be drawn, and after an inspection gave his approval of the stone therein. The contractor counting upon the assurance thus given entered into an agreement with the owners of the quarry for the required stone. Some of the cut stones were received at the dock and approved and accepted by the engineer. Others had been quarried and cut but not delivered when a question arose as to the fitness of the stone for the purpose intended. Final authority to settle the dispute rested with the Secretary of the Navy under the terms of the contract and he decided against the use of the stone. The contractors were then required to purchase and supply other stone at an increased expense to them. Upon suit the court allowed compensation for the stone delivered and approved and accepted by the engineer, but denied the right to recover for stone cut and not delivered or for the difference in cost between the rejected stone and that which the contractors were required to supply. In reaching its decision the court held that the decision of the engineer in charge of the work as to the quality of the stone would be final when properly exercised, but that his approval of the quarry from which the stone was to be taken could not forestall his own judgment or that of a succeeding engineer as to stone received and about to be used. His province was to judge the particular stones, not merely a type of stone, and his judgment therefore could be final only as to stone cut, delivered, approved, and accepted. (*United States v. Barlow*, 184 U. S. 123 [1902].)

§ 110. Defects Apparent After Acceptance

A matter of great importance is that of the effect of acceptance, by a properly constituted board of officers, of a public work constructed by contract under supervision of officers

of the United States, on the right of the government to recover for a breach of contract—when the breach consisted principally in a departure from the requirements of the specifications, resulting in certain defects that became apparent after acceptance. Reference must be made to the case of *United States v. Walsh*, 115 Fed. 697 (1902), reversing 108 Fed. 502 (1901). The question is of such great importance to the contractor that it seems wise to quote in full, applicable paragraphs of the syllabus:

“A contract for the construction of a dry dock for the United States required such construction to conform in all respects to the plans and specifications which were attached, and made a part of the contract, and provided that such plans and specifications should not be changed in any respect except upon a written order of the bureau of yards and docks, and by written agreement between the parties. It further provided that the government should have a competent civil engineer in charge of the work, who should have the privilege of inspecting at all times the materials and work, with power to reject either materials or work deemed by him unsuitable or not in conformity with the contract or plans and specifications. *Held*, that such engineer could not bind the United States by consenting to deviations from specific requirements of the specifications as to workmanship or materials, which fact the contractors were bound to know, and that no action or neglect of his or his subordinate could operate as a waiver or estoppel on the part of the government to relieve the contractors from liability for such departures from the requirements of the contract.

“The contract further provided that the contractors should not be entitled to full and final payment until the dock had been tested by officers designated by the government, and accepted after their approval. *Held*, that an acceptance and payment of the contractors after such test did not conclude

the government if made in ignorance of facts which, if known would have led to a refusal to accept, and that, where the final test was made under conditions which did not permit structural departures from the specifications to be discovered by the officers making it, the government was not chargeable with notice of such defects, to preclude it from holding the contractors liable therefor on their subsequent discovery, because of the knowledge of or consent to the same by its engineers in charge of the work, who, as the contractors were bound to know, had no authority in the premises.

"The acceptance by the engineer, or his acquiescence as the work proceeded, and the final acceptance of the dock by the board of officers designated by the Navy Department are important evidential facts tending to prove that the work and materials complied with the contract; but they are not of controlling effect, and neither such acceptance nor the payment of the contract price necessarily deprives the government of its right of action for a breach of the contract in material and substantial particulars."

§ III. Conclusions to be Drawn

That this is a decision of far-reaching importance to contractors with the government is obvious. The case was not carried to the Supreme Court and there is no evidence the precise point involved has ever been there presented and decided. A consideration of all the reported cases bearing on this question leads to the following conclusions:

1. That in so far as the inspector or superintendent of construction merely exercises a discretion and judgment as to quality and quantity of material or work, vested in him by the terms of the contract and made conclusive thereby, the government, in the absence of fraud, will be bound by his decision.

2. That where changes in plans or specifications are to

be made only when approved by some person or persons named in the contract, the inspector or superintendent is without authority to order or approve such changes, and no such action on his part would be binding on the United States.

3. Where an authorized person or board makes such examination of the completed work as is possible and accepts the same for the government, in ignorance of structural departures from the specifications (and it may well be that the same result would follow if with knowledge of such departures), the government would not be bound by such acceptance or the completed payment which followed it.

4. Or in other words, where the contract vests authority to order or approve changes in plans in one officer or board, the contractor will act upon the approval or order of any other person or board at his peril.

§ 112. The Burden of Notifying the Inspecting Officer

In connection with inspection, it sometimes happens that the contract requires the contractor to notify the inspecting engineer when he has material ready for inspection. If it does, then the burden is on the contractor actually to notify the engineer. If it should happen that the latter does not receive a mail notice, this will not release the contractor from the obligation of actually notifying him. (15 Comp. Dec. 319 [1908].)

§ 113. Apparent and Latent Defects—Finality of Officer's Decision

Defects are sometimes apparent which at the time or in the judgment of the particular officer are not serious, but of which another and succeeding inspector at a later stage of performance may take a different view. It becomes necessary to know what the courts have had to say on the subject of such defects in their relation to inspection and also in regard to de-

fects which were not apparent at the time the work was passed and have developed later. A few of the cases bearing on this most interesting subject may be reviewed as follows:

A contractor agreed to supply and fireproof lumber of a specified kind and quality. He purchased the lumber and, as required by the contract, submitted it to the government officers for inspection before fireproofing. It was inspected, passed, and accepted. After treatment by the fireproofing process some of it was rejected because of defects which it contained and which were apparent at the time it was passed and accepted.

Payment was refused for the part rejected on this second inspection and suit was brought to recover. The court held, first, that in the absence of fraud or gross mistake the judgment of the inspecting officer was conclusive; second, that having been inspected and passed pursuant to the terms of the agreement, the inspection must be regarded as to the quality and dimensions of the lumber. Judgment was awarded to the claimant. (*Electric Fireproofing Co. v. United States*, 39 Ct. Cl. 307 [1904].)

Another contract provided that all pumping required to keep a lock pit free from water would be done by the United States and for this purpose it was made the duty of the engineer in charge to locate such wells, reservoirs, and drainage ditches as he deemed necessary. He located one well and then arbitrarily refused to do more. As a result of his refusal the contractors were compelled to expend large sums for pumping. They brought suit to recover the amount so expended. The court held that the mere fact that the contract made the engineer judge of the necessity of locating the wells, etc., would not justify conduct on his part entirely arbitrary and unreasonable and that his action was a violation of the contract. It was also held that extra work growing out of the engineer's

refusal and not included in contract, but which the claimants were compelled to do, was not subject to the provisions of the agreement which made the decision of the engineer final as to quantity and quality of material. (*Collins v. United States*, 34 Ct. Cl. 294 [1899]); 35 Ct. Cl. 122 [1900].)

§ 114. Superintending Officer Determines Facts Not Law

In contracts for filling or excavating, the provision which makes the decision of the government officer final as to quantity or quality refers only to his measurement in point of fact and not to the principle of law on which it is made, as it is the province of the court to determine the law of the contract. Thus, if an engineer should make measurements in disregard of a custom which prevails on government work, the measurements would not be held conclusive. (*Lyons v. United States*, 30 Ct. Cl. 352 [1895]; *Collins & Farwell v. United States*, 34 Ct. Cl. 294 [1899].)

§ 115. Meaning of "Final" as Applied to Officer's Decision: Latent Defects

A contract for constructing a tunnel contained the usual provisions as to the finality of the decision of the engineer officer in charge as to quality and quantity, and for the retention by the government of 10 per cent of the payments due, pending completion, final approval, and acceptance of the work. The contractors sublet part of the work and the subcontractors did it in such a manner as seriously to threaten the stability of the entire work. The grave defect was not noticed at the time by either the contractor or the officer. The latter passed and accepted it and paid over the guarantee fund which had been withheld until final acceptance, and the contractor thereupon settled with the subcontractor. Sometime afterward the faulty work was discovered, operations were ordered suspended by the government, and remained suspended for a

number of years. The contractors were never permitted to resume, but the government finally finished the tunnel. The contractors brought an action to recover payment for some of the work which they had done and for money retained pending final approval and acceptance. For the United States a counter-claim was filed for expenditures in repairing the defective work.

In allowing this counter-claim, the court held that the provision of a contract which declares "the decision of the engineer officer in charge as to quality and quantity shall be final," has reference to his decision upon final inspection, preceding acceptance of the work as a whole and not to the inspection and approval of portions thereof as completed, and that in this case the acceptance of the defective work was not the final decision contemplated by the contract. The court held further that if a contractor pays his subcontractors before such final decision is made, he does so at his own risk, and if there are latent defects of which the contractor and officer are ignorant when instalments are paid, the loss arising from their discovery before or upon final inspection must fall upon the contractor. (*Beckwith & Quackenbush v. United States*, 38 Ct. Cl. 295 [1903].)

This decision relates to the famous Lydecker tunnel, designed to secure an adequate supply of water for the national capitol. Were it not for the fact that the court found that the contractors did not use reasonable diligence in inspecting the work of their subcontractors as it progressed, and hence showed lack of good faith, it would be in conflict with the other decisions cited. It emphasizes, however, the strong tendency of the courts to exact the utmost good faith on the part of government contractors, while at the same time giving to the government the benefit of every loophole, since in this case the inspecting officer seems to have been equally at fault with the contractors in exhibiting a lack of diligence.

CHAPTER XIV

DISPUTES AND COMPROMISES

§ 116. The Rule as to Compromises

Parties who have claims against the United States, the amount of which can be readily ascertained but which are disputed by the officers authorized to adjust the same, may compromise the claims and accept smaller sums than those claimed. In case, however, that such compromise is entered into voluntarily and a discharge in full for an entire claim is executed, the party cannot subsequently sue the United States and recover in the Court of Claims for any part of the claim relinquished in compromising. (See *Savage*, Exr. v. United States, 92 U. S. 382, 388 [1875]; and cases cited.)

Such compromises should be thoroughly understood before they are entered into, from the standpoint alike of the government and of the contractor. In one case, regarding an item of superintendence and inspection, a question was raised about a consideration for the compromise and the Comptroller of the Treasury held against the government. (15 Comp. Dec. 190 [1908].)

§ 117. Principles of Compromise

The principles underlying compromises with the government have been clearly set forth by the Supreme Court in *United States v. Corliss Steam Engine Co.*, 91 U. S. 321 (1875), in which case it appeared that the Secretary of the Navy in the interest of the public had suspended work contracted for and had afterwards settled with the contractor. The court in this case fixed the principles governing settlements or compromises with the government in the following

language: "When a settlement in such a case is made upon full knowledge of the facts, without concealment, misrepresentation, or fraud, it must be as equally binding upon the government as upon the contractor."

Such compromise settlements, when upheld, follow the usual principle of contracts that there shall exist a meeting of the minds of the parties, but they differ from this principle in respect of the fact that officers of the executive departments have no authority to settle and pay claims for unliquidated damages and thus they can pass only upon accounts which might be adjusted and liquidated by arithmetical calculation. (*Power v. United States*, 18 Ct. Cl. 263 [1883].)

§ 118. Ruling by the Comptroller

The Comptroller of the Treasury, in the decision to be found in 15 Comp. Dec. 74 (1908), has seemingly gone a step further than the Court of Claims in this connection, but he probably had in mind that the damages which he stated in this decision the government officers could pay were susceptible of such arithmetical calculation. In this case, the contract provided for the monthly payment of 90 per cent of the monthly estimated value of the finished material delivered on the site and erected in place at the date of the estimate, and the government reserved the right to postpone or interrupt the work for such periods as were, in the judgment of its specified officer, necessary. The government did not interrupt or postpone the work before the finishing of the material, but did interrupt and postpone the delivery and erection of it in place for an unreasonable period, because of a contingency that could not have been in contemplation by the parties at the time of entering into the contract—in this case the failure to provide a building to house certain electrical machinery. The Comptroller decided that an estimate of the value of the material finished and ready for delivery, exclusive of the cost of cartage and installation in

place, might be made and payment might be made therefor—less the percentage required by the contract to be retained, and any damages, if such there should be, caused by the delay to the contractor.

CHAPTER XV

STATUTORY PROTECTION OF MATERIAL MEN AND LABORERS

§ 119. Ordinary Mechanic's Lien Not Applicable

Persons who furnish materials to a private firm and laborers who furnish their services may protect their interests by means of what is known as a "mechanic's lien," etc. This cannot be used in connection with government work. It has been repeatedly decided by the Attorney-General (see 21 Op. Atty. Gen. 18 [1894]) that no person has a right to file a mechanic's lien against the United States. Under an Act of Congress approved August 13, 1894 (see Appendix D), and by a further act amendatory thereof approved February 24, 1905, material men and laborers are protected in a way and by a method which will now be discussed. This act by its words requires bonds from those awarded contracts for the construction of any public building or for the prosecution and completion of any public work. It is therefore a matter of the first importance to business men to know whether this act affords them any protection should they be dealing with a government contractor and the latter default on his contract.

§ 120. "Public Work" Defined

The writer has had occasion several times to review this question for the National Association of Credit Men and for various large manufacturers, and he has always explained the necessity of ascertaining, before supplying materials to be used in connection with government contracts, whether the contract in question was in connection with the construction of a public building or in connection with a public work. The

importance of first ascertaining this fact arises from the fact that Attorney-General Griggs in an opinion to be found in 23 Op. Atty. Gen. 174 (1900), held that the words "public work" meant something connected with or let into the ground. The learned Attorney-General seems to have based his opinion largely upon the fact that the act of Congress in question, sometimes called the Heard Act, was intended to give the material man something very much akin to a mechanic's lien, which of course ordinarily only applies to a building. This view of the case by the Attorney-General has been upheld in several decisions of state courts.

This view has been to a large extent modified, however, by the decision of the Supreme Court of the United States in the case of Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24 (1910). The public work in this case was a battleship and the Supreme Court decided that a vessel building for the United States, title to which passes to the government as fast as paid for, is a public work within the meaning of this section, and that whether a work is public or not does not depend on it being attached to the soil. The Supreme Court lays down the general doctrine that when a work belongs to the representative of the public it is public, and so it may be said that with this decision such contracts are within this act.

In a dissenting opinion to be found in *Ellis v. United States*, 206 U. S. 261 (1906), the late Justice Moody mentioned three elements as entering into public units:

1. Permanent existence.
2. Structural unity.
3. Capability of being severally regarded as complete works.

§ 121. Illustrative Cases

It is immaterial whether or not the labor and material are furnished to a contractor or to a subcontractor; the material

man has his remedies against the default of either, as was decided by the Supreme Court in the matter of *Hill v. Surety Co.*, 200 U. S. 197 (1906). It has been further decided in *Smith v. Mosier*, 169 Fed. 430 (1909), that even if the contractor has paid the subcontractor in full, the man who has furnished material to the latter and has not been paid has his rights under the bond. The conditions under which the material man can look to the surety on the bond are that if the United States does not bring suit within six months after completion and final settlement of the contract, the material man can bring suit in the District Court of the United States for the district in which the contract was performed. It must be remembered, however, that the material man has only one year and no longer after performance or final settlement to bring this suit.

Final settlement of a contractor's account within the meaning of this act is not the time when the final payment is made, but is that time when a determination is made by the proper authority of the amount due, and the six months fixed in the act is to be computed from the date of such determination. (*Ill. Surety Co. v. Peeler*, 240 U. S. 214 [1916].)

Under the act as amended the United States District Courts alone have jurisdiction of these suits and only one suit can be brought. (See *Ill. Surety Co. v. United States*, 212 Fed. 136 [1914]; *United States v. Wells*, 203 Fed. 146 [1913].) Other creditors have the right to intervene and the creditor who commences the suit does not thereby acquire a preference over the others.

In a broad general way the bond that is sued on is intended to cover merely: (1) payment for the visible material furnished for direct use and incorporation in the work, and (2) wages to men whose services are directly employed in doing the work. (See *United States v. Kimpland*, 93 Fed. 403 [1899].)

§ 122. Further Interpretation of Act

The words "directly incorporated into public works" had received from the Supreme Court of the United States an interpretation which brings within the act bills for groceries and provisions furnished the contractor and consumed by laborers engaged on the work when the boarding of the laborers was a necessary and integral part of the work. (Brogan v. National Surety Co., 246 U. S. 257 [1918].)

PART IV
BREACH

CHAPTER XVI

WHAT CONSTITUTES BREACH

§ 123. How Breach Arises

A breach of contract is a violation of an obligation or duty assumed by contract. In connection with government work it is attributable to one of two causes:

1. An act of the United States through its officers or agents;
2. An act or omission of the contractor.

§ 124. Acts of Government Which Do Not Constitute Breach

In treating of the first of these two classes of breaches or default in the carrying out of government contracts, it is well to consider carefully the effect of our system of government by equal and co-ordinate branches. A contract between the government and an individual cannot be affected specially by a general law of Congress affecting all citizens alike. The United States as a contractor cannot be held responsible for the United States as a sovereign or lawgiver and if this is borne carefully in mind much trouble may be avoided. To give concrete instances, attention is called to several decisions of the Court of Claims where contracts have been affected by a subsequent revision of the tariff, resulting in an increased cost to the contractor of goods which he has agreed to furnish the government. The decisions rendered by the court hold that the enactment of such a law is not a violation of the contract on the part of the United States. (See *Deming v. United States*, 1 Ct. Cl. 190; *Jones & Brown v. United States*, *id.* 383; *Carmick & Ramsey v. United States*, 20 Ct. Cl. 126 [1866].)

§ 125. Rules of Acceptance Made After the Contract

It likewise has been held that the subsequent adoption by the government of reasonable regulations designed to prevent fraud do not constitute a breach. (*Wormer v. United States*, 13 Wall. 25 [1871].) Nor does the subsequent adoption by the United States of a new rule of inspection of supplies of itself constitute a breach. If the contractor feels that the change in inspection would constitute a breach he must first make a tender under his contract and have acceptance refused before bringing suit. (*Smoot's case*, 15 Wall. 36 [1872].)

§ 126. Breach by the United States

While acts of the legislative branch of the government and subsequently adopted regulations of the executive branch, which change the status of the contractor, have frequently been held by the courts not a breach of contract by the United States, positive acts of the government officers often bring about this result. A contractor cannot be held liable for a failure to deliver supplies if the officers of the government by their actions deprive him of his source of supply. (*Peck v. United States*, 102 U. S. 64 [1880].) A contract being for a certain quantity of supplies "more or less," the post-commander notifies the contractor that he will be required to deliver all that his contract calls for. The contractor makes a tender of the full amount and the officers at the post refuse acceptance. It is no defense of this breach by the government for it to show that the contractor afterward abandoned the contract. (*Williams v. United States*, 15 Ct. Cl. 461 [1879].)

If the government wrongfully neglects to fix a location and furnish working plans for contract work, it will be liable for the direct and natural loss which the contractor sustains because of the delay. (*Harvey & Livesey v. United States*, 8 Ct. Cl. 501 [1872].) But a delay in designating the site of work to be done will not be considered unreasonable nor en-

title the contractor to damages when he was not ready to proceed and did not make any request to have the site fixed. (*Andrews v. United States*, 16 Ct. Cl. 265 [1880].)

If it is the duty of the United States, under a contract, to build a coffer-dam, the dam must be of sufficient size and strength to exclude the water from the area in which the contractor is to excavate for a period long enough to permit the performance of that work. (*Skelsey v. United States*, 23 Ct. Cl. 61 [1888].) And if delays and damage to the contractor's tools, etc., are caused by a leakage, the government will be liable even though it occurred during a period covered by an extension of the contract made at the contractor's request. (*Collins & Farwell v. United States*, 34 Ct. Cl. 294 [1899].) If, on the other hand, the coffer-dams are erected by the contractor according to the plans and under the supervision of officers of the United States for the protection of the contractor's work, and are then destroyed by an unusual storm without fault of either party, the government is not liable for the consequences. (*Satterlee v. United States*, 30 Ct. Cl. 31 [1895].)

If a contract places upon the United States the duty of supplying flasks to be used in casting guns, it will be liable if failure of a casting is due to their inadequacy or defective construction. (*South Boston Iron Works v. United States*, 34 Ct. Cl. 174 [1899].)

Where, in pursuance of a military order directing the movement of troops, empty passenger equipment is assembled by a railroad company for the purpose of transporting such troops, and subsequently such order is revoked, necessitating the return of the cars unused, the railroad company is entitled to payment at the regular tariff rates for its services in hauling and switching the necessary cars. (15 Comp. Dec. 434 [1909].)

A contract entitled a person to furnish all supplies needed

by the army at a certain place within a limited time. The contract was rescinded by the Secretary of War. In order to recover for the breach, claimant should have proved that supplies were needed after the rescission and before the expiration of the contract time, and shown the pecuniary loss suffered in not being allowed to furnish them. (*Grant v. United States*, 7 Wall. 331 [1868]. Cited in Ct. Cl. as follows: 7:494 [1871]; 14:425 [1878]; 16:448 [1882]; 35:9 [1899]; 39:69 [1903].)

The work of a contractor in the erection of a building was stopped by the government officers and he was not allowed to resume until 60 days had elapsed. In an action for damages it was held by the court: "As between individuals," this would certainly be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule. (*United States v. Smith*, 94 U. S. 214 [1876].)

§ 127. Breach by the Contractor

This subject has been, and will be further, treated incidentally in other portions of this work. The subject may be passed with a brief reference to a few cases. The case sometimes occurs that the contract provides for its annulment by a particular government officer or board, that the contractor without justification refuses to go on with the work, and that the officer directly in charge himself annuls the contract. The action of this officer, following the contractor's breach, cannot be reviewed by the courts upon the ground that the annulment should have been made by the superior officer or board. (*Graham v. United States*, 231 U. S. 474 [1913].)

On the other hand, the right of the contractor to continue work depends upon the approval of the engineer in charge who can express his dissatisfaction with its progress, without his

action being taken as conclusive of a breach by the contractor. Moreover, when, except for the refusal of the United States to allow the contractor to proceed, the work might have been finished within the time limit, the United States cannot claim a breach for want of diligence in performance and annul the contract. (*United States v. O'Brien*, 220 U. S. 321 [1911].)

Sometimes the government claims a breach of contract and resists payment on that ground, especially in those cases where merchandise or other personal property has been tendered to the government and upon inspection rejected. In one such case the contractor agreed to take back certain mules furnished the government and afterwards rejected because not up to the contract requirements. He also agreed to bear the incidental expense for feed and transportation to which the government had been put on their account. In this case the government kept and used the mules, notwithstanding their rejection by the inspection officer, and so the court held that the government by its action had waived the defects and would have to pay the stipulated price. (*Allen v. United States*, 3 Ct. Cl. 91 [1867].)

The above decision is closely in line with other decisions of the Court of Claims holding that breaches of contract may be waived by the action of inspection officers. For instance, the government will be held to have broken its contract if its agents refuse to accept a contractor's work after they have led him to believe that it was satisfactory or that he was complying with his contract. In a case in which this point was decided there was also a provision in the contract that the approval or rejection of the government's inspectors should be final. The acts of the inspectors led the contractor to believe that his work, defective though they afterwards claimed it to be, was satisfactory and the court so held. (*Merriam v. United States*, 20 Ct. Cl. 290 [1885]; *Kimball v. United States*, 24 Ct. Cl. 35 [1888].)

§ 128. Waiver of Breach

One of the essential differences between dealing with the government and dealing with a private party is the tendency of the court to regard the government always in the nature of a ward. With respect therefore to breaches of contract, there is the absolute necessity on the part of the contractor of seeing to it that government officers in cancelling contracts, or breaching the same by correspondence, do so in clear and explicit terms. Upon one occasion a contractor agreed to furnish all of a certain article which the government might require during a certain period. After supplying quantities of the article he was informed that his delivery had been in excess of the amount called for by the government's requisition and that "it is not now probable that further requisitions will be made"; he accordingly removed the excess supply. Several months later he was notified that further deliveries were required of him and when he refused, the courts held that he had defaulted on the contract. This illustrates the necessity of not attaching too much importance to words of indefinite meaning, such as the ones quoted in this case. That is illustrated also in a case where the engineer in charge of certain work estimated in a letter to a contractor that the amount of sand required would be 179,231 cu. yds., while the contract called for "140,200 more or less." In this instance the letter was held not to be a new contract for the additional amount nor modification of the original contract. (*Smoot v. United States*, 237 U. S. 38 [1915].)

If the government refuses to receive goods offered under a contract and they are of the kind and quality specified, the contractor is thereby absolved from any further performance under it. On the other hand, if a contractor is unable to make deliveries on a contract with the government for continuous deliveries of a specified article and agrees with the properly authorized official to meet the emergency by delivering goods

of a different class to be paid for according to actual value, the delivery is not one under the contract. It is an emergency purchase, and the acceptance of the substituted articles by the government is not an acceptance under the contract. (*Barry v. United States*, 229 U. S. 47 [1913].) It will be well to remember, however, what has already been mentioned, that if the contractor who has been absolved from further performance because of a breach upon the part of the government, is threatened by the government's agent with a withholding of payments already due, and therefore consents to make further deliveries, he cannot recover the increased market value of goods supplied after the breach, but is limited to the price fixed in the contract, his act in resuming deliveries constituting a waiver of the breach. (*Gibbons v. United States*, 8 Wall. 269 [1868].) In fact, if the contract is to run for a certain time and he makes deliveries after its expiration, the same result, a waiver of the breach, will follow. (*Gibbons v. United States*, 2 Ct. Cl. 421 [1866].)

§ 129. Impossibility of Performance as Excuse for Non-Performance

Having now considered breaches of contracts caused by the acts of the government through its officers and agents, and breaches caused by the act of the contractor, there is a third element to be considered at this point, namely: impossibility of performance arising through circumstances over which neither party to the contract has any control, as excusing a breach. Acts of God and the public enemy are of this class. The Supreme Court of the United States in *Dermott v. Jones*, 2 Wall. 1 (1864), used the following language: "It is a well-settled rule of law that if a party by his contract charges himself with an obligation possible to be performed he must make it good, unless the performance is rendered impossible by the act of God, the law, or the other party. Unforeseen diffi-

culties, however great, will not excuse him." This decision is, of course, in harmony with the general principle of the law of contracts that if the liability of the promisor is created by an express promise, subsequent impossibility does not as a general rule excuse performance, though if the event which has happened is one which is not fairly within the meaning of the contract and cannot be assumed to have been contemplated by the parties, such event operates as a discharge of the liability.

§ 130. Act of God Is Not Always a Legal Excuse

The text of the *Dermott v. Jones* decision noted above is not, however, so worded that it would warrant the conclusion that acts of God will absolve the contractor from performance within the view of the Supreme Court of the United States. Taking the decisions of the federal courts as a whole, it may be said that there is some doubt as to when an act of God would relieve the contractor, and the Court of Claims has decided in some instances that if the contractor wishes exemption from such acts he must see that the contract so provides. (See also 17 Comp. Dec. 137 [1910]; 18 *id.* 669 [1912]; *Logging Co. v. Robson*, 69 Fed. 773 [1895].)

It was held on one occasion that: ". . . . Counsel for plaintiff are mistaken in their application of the law in such cases, when it is claimed the bridge company was excused from performance because of the act of God, where the event which caused the impossibility of performance might have been anticipated and guarded against in the contract. The event might well have been anticipated by the parties. The distinction is that if an obligation be imposed by law, and does not arise from his contract, if it be rendered impossible afterwards by the act of God, or by the act of the government, he will be excused for non-performance." (*The Phoenix Bridge Co. v. United States*, 38 Ct. Cl. 492, 509 [1903].)

§ 131. Impossibility Not Always Allowed

In the case of *Jacksonville, etc., Ry. v. Hooper*, 160 U. S. 514 (1896), the railway company by way of defense had set up the claim that its contract in one particular was impossible of performance. In its consideration of this, the court said:

"There is such a defense known to the law as an impossibility of performance. Instances of such a defense are found in cases where the subject matter of the contract had ceased to exist, as where there was a contract of sale of a cargo of grain supposed by the parties to be on its voyage to England, but which, having become heated on the voyage, had been unloaded and sold, and where it was held that the contract was void, inasmuch 'as it plainly imputed that there was something which was to be sold and purchased at the time of the contract,' whereas the object of the sale had ceased to exist. (*Courtrier v. Hastle*, 5 H. L. Cas. 673 [1856]; *Allen v. Hammond*, 11 Pet. 63 [1837].)

"So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it. (*Strickland v. Turner*, 7 Exch. 208 [1852].)

"So where there is obvious physical impossibility, or legal impossibility, which is apparent on the face of the contract, the latter is void.

"But the present case does not fall within either of these classes but is a case of impossibility of performance arising subsequently to the making of the contract.

"Here, the general rule is that such impossibility, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract. 'The principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the

undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse performance. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts—not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of the dispensing power is not a judicial function.’ (The *Harriman*, 9 Wall. 161, 172 [1869].)

“The following decision is in the same line: ‘Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility. But where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by the party, nor within his control.’ (Jones v. United States, 96 U. S. 24 [1877].)”

§ 132. Rules Laid Down by Supreme Court

It has been pointed out heretofore in this chapter that unusual or unforeseen business conditions cannot be classed as those acts which will absolve a contractor from performance. The Comptroller of the Treasury has decided that perils of the sea do not excuse a contractor. However, the Supreme Court has laid down certain rules as follows: “There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking where the event which causes the impossibility might have been anticipated and guarded against in the contract, and where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be

reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." (Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt, 149 U. S. 1, 14 [1893].)

§ 133. Consequence of Performance Being Prevented by One of Parties

"Where one party to an executory contract prevents the performance of it, or puts it out of his power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby." (Lowell v. Life Ins. Co., 111 U. S. 264 [1884].) This language does not need any interpretation. In the case of *United States v. Behan*, 110 U. S., 338 (1884), the measure of damages in such cases is also laid down. The syllabus states: "Where one party enters upon the performance of a contract, and incurs expense therein, and being willing to perform, is, without fault of his own, prevented by the other party from performing, his loss will consist of two distinct items of damage: first his outlay and expenses, less the value of materials on hand; second the profits he might have realized by performance, which profits are related to the outlays and include them and something more. The first item he may recover in all cases, unless the other party can show the contrary; and the failure to prove profits will not prevent him from recovering it. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative." The Supreme Court of the United States in the case of *Clark v. United States*, 6 Wall. 543 (1867), held the government liable for damages caused by the interference of its officers, even after the contractor continued work beyond the fixed time limit.

CHAPTER XVII

CANCELLATION OR ABANDONMENT OF CONTRACTS*

§ 134. Agreement to Terminate

Experience has demonstrated that many contracts, entered into in good faith, are never performed—and in some cases performance is never even begun.

Sometimes the possibility of conditions arising which would make such a termination desirable for one or both parties is foreseen and provided for in the agreement. Sometimes a contract becomes impossible of performance; sometimes there is an abandonment and at other times a breach by one party may justify a refusal by the other to perform further.

In the contracts and in decisions of the courts are found the words: *annul*, *cancel*, *renounce*, *abandon*, *abrogate*, *repudiate*, and *rescind* used to define or express the act of terminating an executory agreement before performance is complete. These various terms are not always used correctly by those who frame the contracts nor by the courts in construing them. Their technical distinction is lost sight of and frequently an “annulled” contract is said to be the source of certain rights arising after annulment. This is obviously a misuse of a word having a definite meaning. “*Refuse to perform further*,” *abandon*, *renounce*, *repudiate*, or “*take away the contract*” more nearly expresses the intent in such a case. (United States v. O'Brien, 220 U. S. 321 [1911].)

§ 135. Repudiation by One Party

As a contract cannot be made by one party alone, but

*See Appendix D, Act Validating Informal War Contracts.

requires the meeting of two or more minds, so it follows that one party to it cannot unmake it, or in other words, *rescind*, *cancel*, *abrogate*, or *annul* it, as these terms all imply a destruction of the instrument. He may, however, *abandon* or *repudiate* it, i.e., refuse to perform or to continue performance, and he may base his refusal upon some legally sufficient ground touching the validity of the contract itself, such as fraud, mistake, duress, infancy, etc.—grounds which would justify a court of equity in decreeing rescission; or he may refuse to perform because of a breach by the other party, if it be such a breach as would actually or impliedly amount to a renunciation of the agreement.

§ 136. Effect of Failure of One Party to Perform

A mere failure by the contractor to perform within the time limit is not such a breach as would, in the absence of a proper clause in the contract itself, justify the government in treating the contract as at an end. For such a breach the remedy would be a recovery of damages. But if, for example, under a supply contract, goods are tendered by the contractor, which in all respects comply with the specified requirements, and acceptance is refused, this is a breach which would justify the contractor in a refusal to perform further, and his abandonment would not prevent recovery for goods previously furnished and not paid for, nor of prospective profits on such goods as would have been supplied but for the government's breach.

In the case of *Anvil Mining Co. v. Humble*, 153 U. S. 540 (1894), performance had been commenced, but completion was prevented by defendant, and Justice Brewer speaking for the court said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform;

in other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. Generally speaking it is true that when a contract is not performed, the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party; and if such other party interferes—hinders and prevents the doing of the work—to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop, and sue for the damages which it has sustained by reason of the non-performance which the other has caused.”

§ 137. Anticipatory Breaches of Contract

In the case of *Roehm v. Horst*, 178 U. S. 1 (1900), there is a very careful review of the cases relating to anticipatory breaches of executory contracts, or, in other words, a breach which consists in one party announcing, before time for performance has arrived, his intention not to perform or by some act rendering himself unable to perform. The rule is there laid down that the injured party may at his option consider the agreement at an end from the time of the breach and bring suit immediately, or he may retain a right to sue and wait till the time when the act of performance was to be done.

And in a similar case *Wells v. Hartford Manilla Co.*, 55 Atl. 599 (1903), it was said: “The contract remains a subsisting one until the parties have mutually elected to treat it otherwise, and given unmistakable evidence of such an election. A renunciation does not create a breach. There must be an

adoption of the renunciation. The renunciation must be so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent." (See also *Hayes v. City of Nashville*, 80 Fed. 641 [1897].)

§ 138. Grounds for Rescission

To rescind a contract is not merely to stop performance of it, but to cancel or abrogate it from its inception; that is, not merely to release the parties from the mutual obligation of performance, but to destroy the contract and restore the parties to the position in relation to each other which they would have occupied if no such contract had ever been made. The usual ground for rescission is one which existed at the time the agreement was entered into, such as fraud, duress, mutual mistakes, etc.

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which before had subsisted." (*Grymes v. Sanders*, 93 U. S. 55, 62 [1876]; *McLean v. Clapp*, 141 U. S. 429 [1891]; *Shappirio v. Goldberg*, 192 U. S. 232 [1904].)

Where cancellation is sought because of alleged fraudulent performance, the fraud must be of such a character as to indicate a clear repudiation of any intention to carry out the terms of the contract. (*Young Lock Nut Co. v. Brownley Mfg. Co.*, 34 Atl. 947 [1896].)

Not every breach of a contract authorizes a rescission. For ordinary breaches damages must be the remedy, for, as

before pointed out, *rescission* as distinguished from *abandonment* implies some reason existing before the agreement was made, or implies that because of some mistake the agreement is different from that which was intended.

Having discussed some phases of the law applicable to rescission or cancellation and abandonment, their application to government contracts may be considered in particular, first, by reference to those cases in which contracts have been terminated by the government, and then to those in which contracts have been abandoned by the contractor.

§ 139. Termination of Contract by Government

In a case in which the facts showed that the government terminated a contract after a partial performance, and by authority of the contract itself, the contractor brought suit to recover the usual 10 per cent reserved by the government until the whole work was completed and accepted, and also for the amount which the government had saved by reletting the contract to other parties. In respect to the first of these claims the court said: "This 10 per cent is retained, in the language of the contract, until the whole shall be completed. It is retained as security for that end. The work is to be completed by others and the expenses deducted from any money that may be due him. . . . Unless, therefore, the government has sustained some loss, some pecuniary or legal damage by his failure, the money which he has fairly earned should be paid to him when the work has been completed through others."

As to the other claim it was said: "So on the other hand, we think it equally clear that when his contract is rightfully terminated, he is entitled to no further rights in regard to its performance by others. The government does not by reason of being compelled by his failures to resume control of the work, do so for his benefit, but for its own. They do not thus

become his agents to do the work for him which he failed to do, and let him reap the profits of a work which he refused or neglected to perform." (Quinn v. United States, 99 U. S. 30 [1873].)

§ 140. Default by Contractor

The next two cases arise out of contracts more recent in origin and also somewhat different in their essential provisions.

After default by the contractor, the government annulled his contract and relet the same in accordance with a provision of the agreement, thereby undertaking to complete the work in his stead and to charge him with the excess cost. The court held that in such a case the contractor is not bound for the difference in cost unless the contract as relet is the same as the original contract. (United States v. Axman, 234 U. S. 36 [1914].) But see the next case.

Where under a contract, in the event of a default by the contractor, the government was "authorized to complete the work at the expense of the contractor, it was not confined to that remedy, but could recover from the contractor or the surety the actual damages sustained." Here the subject of contract, a building, was destroyed by fire during construction and not rebuilt by the contractor. His default being complete, the government after considerable delay relet the contract. "Where the government relets a contract with substantial differences, the liability of the surety is not released from all obligation, nor is his liability measured by the difference between the two contracts, but his liability is measured by the actual loss sustained by the government, in the case represented by the partial payments made as work progressed and for which it received nothing in return." (United States v. United States Fidelity Co., 236 U. S. 512 [1915].) This case is to be distinguished from the preceding one, for the reason

that there was in the Axman case, "not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract," a most important distinction and case.

"A provision of a contract for doing work for the United States that, in case of failure to duly prosecute the work, the contract might be annulled by the engineer in charge, in which case all percentages due or to become due to the contractor should be forfeited, is not inconsistent with a further provision that if the contractor failed to complete the work as agreed, all sums due and percentages retained should be forfeited, and the United States might recover any damages sustained in excess of the amount forfeited, and both may be enforced, the contractor being given credit, when the full measure of compensatory damages has been ascertained for all sums so forfeited." (Syllabus, *United States v. Perkins*, 143 Fed. 688 [1906].)

If a contract provides that notice of annulment is to be given in writing, and the engineer in charge gives the notice orally, without objection on the part of the contractor, who then abandons the work, the acts of the parties will be construed or regarded as equivalent to the exercise of the power of annulment in strict accordance with the terms of the agreement. "The law does not presume a waiver on the part of the person against whom the forfeiture is to be enforced, but a waiver can be inferred from silence and acquiescence in the condition which would result from a strict exercise of the power of forfeiture.

" We hold that the reservation of the 10 per cent, as affected by the forfeiture, is a penalty and not liquidated damages, and the claimant is only subjected to such damages as were incident to his failure to perform the contract." (*Kennedy v. United States*, 24 Ct. Cl. 122, 138 [1889].)

§ 141. When the Contractor Is Entitled to Damages

The cases just quoted all arose from a refusal of the government to perform further, following some default or breach upon the part of the contractor, and have been referred to in order to show the liabilities of the contractor in such cases and the limitations thereon.

But it sometimes happens that from the government's point of view it is desirable or necessary that it suspend or terminate a contract even though the contractor has not breached it and stands ready to complete performance. Such action of the government may be permitted by the contract itself or may be a clear breach of it. Except in those cases where the agreement authorizes its termination by one party and relieves him from any liability where it is availed of, the contractor will, of course, be entitled to damages.

He may agree with the proper officers of the government as to the amount which will compensate him for the breach or he may prefer to bring suit to recover where no satisfactory adjustment can be made. In lieu of either of these he may consent to submit the questions to arbitration and be bound thereby.

At this point the holdings in a few cases of this kind may be considered.

Where there has been an improper interference with the contractor, the government cannot assert a forfeiture. One party cannot prevent the other from performing and then annul the contract because he has not performed. If he assumes to do so and puts an end to the work, he is guilty of a breach and liable therefor. (*King v. United States*, 37 Ct. Cl. 428 [1902].)

§ 142. The Measure of Damages

"The renunciation of a contract by a defendant, where the other party has a right to perform, stops performance and

precludes the plaintiff from making damages by proceeding with his work. On proof of the fact that he was ready and willing to perform, a plaintiff will be entitled to recover nominal damages. If he proceeds further with his proof and shows that he had expended money in performing or preparing to perform before notice of the renunciation, he will be entitled to recover back his expenses incurred. If, after establishing his positive losses, or without having established them, he proceeds with his proof and shows that if he had been allowed to perform he would have made a profit, he will be entitled to recover his gains prevented. The general purpose of the law is to make the rightful party whole; to place him in the same resulting position that he would have been in if the other party had not interfered." (*Yates v. United States*, 15 Ct. Cl. 119, 125 [1879].)

The court has held that where the Secretary of the Navy possesses the power, under the legislation of Congress and the orders of the President, to enter into the numerous contracts for the public service "the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem, that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance." (*United States v. Corliss Steam Engine Co.*, 91 U. S. 321 [1875].)

"Parties are bound to good faith in their dealings with the United States as well as with individuals, and the court is of the opinion that no party in such a case could be justified, after accepting such a compromise and executing such discharge, in claiming damages for a breach of the prior contract which had been voluntarily modified and surrendered,

unless the new contract was accepted under protest or with notice that damages would be claimed for the refusal of the United States to allow the claimant to fulfil the contract which was modified in the new arrangement." (Mason v. United States, 17 Wall. 67, 73 [1872].)

§ 143. The Case of War Contracts

When apparently, for all practical purposes, the participation of the United States in the war against the Central Empires came to an end with the signing of the armistice, there was an immediate and imperative need that action be taken to put an end to thousands of contracts for war material for which the need had ended overnight. Some of these contracts were in proper form and signed by the parties as required by Section 3744, Revised Statutes. In some of them provision had been made for cancellation in the event it became necessary and a way for an adjustment of the government's liability provided for. Others were without such provision. In several thousand cases orders had been given, accepted, and work done without formal written contracts, as there had not been sufficient time to frame these and have them signed.

As to those contracts made in compliance with the law and containing a clause permitting cancellation and an agreement as to compensation, no difficulty was experienced. And where no provision had been made for cancellation, the government officers could order work stopped and settle with the contractor in a way which would meet with the approval of the Comptroller of the Treasury, or failing in this, the contractor could avail himself of his right to sue. The real difficulty arose in connection with those agreements which were not made in accordance with Section 3744.

In so far as the advisability of cancelling these contracts was concerned, they were of course on a par with those

which in every respect complied with the law. It was believed that the supplies contracted for would in most instances not be needed and it was just as apparent to the officers of the government that the welfare of the country would be best served if the many manufacturing plants engaged on war business could quickly return to their pre-war activities. The government further believed that contractors would generally accept the view just expressed and would be willing to settle their contracts by a supplemental agreement fair to both parties rather than resort to litigation which would surely mean delay even though it promised greater compensation for damages sustained. The Secretary of War, therefore, put the matter up to the Comptroller of the Treasury and sought his approval in advance of the method of settlement set out in the form of supplemental agreement submitted to him. Beyond certain clauses where changes were pointed out by the Comptroller as necessary, this supplemental agreement in connection with a formal written contract was recognized as a legal and authorized method of settlement.

§ 144. The Treatment of Informal Contracts

But real trouble arose when the Comptroller held that, in order to make a valid supplemental agreement, there must be first an original agreement which was legal. The suggested method of settlement was thus disapproved as to some three thousand informal contracts made in good faith to meet the pressing needs of the army, which had not been reduced to the form required by the law only because of insufficient time in which to do it. The well-established practice of issuing procurement orders which were filled before contracts were drawn was known to the Comptroller and recognized as valid; but he denied the authority of the officers of the government to enter into formal contracts for these emergency war supplies informally contracted for, on the ground that the government no longer needed the articles.

The writer does not believe that the Comptroller's decision correctly states the law. These informal contracts were not void but were merely voidable at the option of the government. If the Secretary of War had wished to recognize them as valid they could have been enforced against the contractor, or, on the other hand, formal agreements might properly have been substituted for them and signed by the parties as required by the statute, and then cancelled according to agreement. The writer knows of no decision justifying the belief that a court of law would have gone into the question of whether the government did or did not need the supplies, there being no imputation of fraud and the treaty of peace not having been signed. In the discretion of the Secretary of War he could have allowed or required performance of every one of these informal contracts to proceed to completion and authorized payment in full, and none could have questioned his authority, though he might subject himself to attack for lack of sound judgment or for extravagant expenditures. But having sought the decision of the Comptroller he must needs abide by it. The conclusion thus clearly becomes apparent that though he could have required all and paid all that the agreement called for, he could not by any other lawful method terminate the contract except, of course, by the very unjust way of refusing to perform further and letting the contractor suffer the loss which would usually follow because of his inability to recover in a court of law.

Confronted by this situation which threatened financial ruin to so many contractors and subcontractors, the Secretary of War took the only step which in fairness to all concerned he could take, by calling the attention of Congress to the situation and requesting that these informal agreements be validated and their cancellation with just compensation be provided for. The matter was given earnest, though rather lengthy, consideration at the hands of the legislative branch

and finally resulted in the passage of the Act of March 2, 1919. (Appendix D.)

§ 145. Arbitration and Award

Parties to government contracts frequently agree that their differences of opinion shall be submitted for binding decision to some person or persons named therein. Such differences may arise in connection with the work or as to compensation due in the event of a cancellation before performance has been completed.

Where a clause in a contract provides that "either party may terminate it upon proper notice, and that thereupon arbitrators shall be appointed to determine the terms upon which the contract shall be rescinded and the compensation to be awarded, a court of equity will not entertain a bill to cancel the contract, as such a bill would be in itself a violation of the provision for arbitration." (Young Lock Nut Co. v. Brownley Mfg. Co., 34 Atl. 947 [1896].)

§ 146. Not All Agreements to Arbitrate Bind

"Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. . . . In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. . . . Agreements in advance to oust the courts of the jurisdiction conferred by law are void." (Insurance Co. v. Morse, 20 Wall. 445 [1874].)

"An agreement, however, to submit to arbitration a ques-

tion of price, value, quantity of damage merely, as it does not oust the courts of jurisdiction of the cause, has long been held to be valid." (Munson v. Straits of Dover S. S. Co., 99 Fed. 787 [1900], and cases cited.)

§ 147. Conditions Precedent to Suit

Moreover, it is competent for parties to stipulate in a contract that facts of this nature shall be ascertained or fixed by arbitrators chosen for such purpose, before any action may be brought, and the parties cannot ignore the condition precedent and sue on the contract; they must at least make an effort to reach a determination according to the terms of the agreement. (Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 242 [1890]; Knoche v. Chicago, Milwaukee & St. Paul Ry. Co., 34 Fed. 471 [1888].)

But the condition precedent must be expressed in the contract or necessarily implied in its terms; otherwise the agreement to arbitrate before bringing suit may be disregarded, although the party so doing is, or may be, liable for breach of the agreement. (Hamilton v. Home Ins. Co., 137 U. S. 370 [1890].)

A clause in a contract to the effect that not only the terms and conditions upon which the contract shall be terminated shall be referred to arbitrators, but that the right to terminate it shall also be referred in the same manner, will not exclude jurisdiction of a court of law or equity, although the party invoking the aid of the court will be liable for a breach of the contract.

§ 148. What Agreements Will be Sustained

Where a contract provides that some competent person designated therein shall determine questions of quantity or fitness of material; or that the increased or diminished compensation of the contractor incident to changes in the plans

shall be fixed by a competent person or tribunal named, whose decision shall be binding, agreements for such arbitrament will be upheld because it is a reference to a person fitted by special knowledge to determine the facts. (*Barlow v. United States*, 184 U. S. 123 [1900]; *Connors v. United States*, 130 Fed. 609 [1905], affirmed 141 Fed. 16 [1905].)

§ 149. What Agreements Will Not be Sustained

But it is not legal for the parties to stipulate in advance that any dispute arising between them, including questions of law as to their legal rights under the contract shall be submitted to arbitrators, and such stipulation will not oust the jurisdiction of the courts. (*Mitchell v. Dougherty*, 90 Fed. 639 [1898].)

Those cases in which there has been an abandonment by the contractors, and the rights and liabilities arising therefrom, will now be considered.

§ 150. Estimating Profits Upon Abandonment by Subcontractor

A subcontractor terminated his agreement with the contractor following a breach by the latter and brought suit for damages. The breach consisted of a delay caused by the United States against which the contractor had failed to protect himself in his contract with his subcontractor. In upholding the right of recovery, the court held that: "No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price, the probable cost of furnishing the material and doing the work." (*Guerini Stone Co. v. Carlin*, 240 U. S. 264 [1915].)

§ 151. Breach by Government Justifies Abandonment

"In a contract to make and complete a structure with agreements for monthly payments, a failure to make a payment at

the time specified is a breach, which justifies the abandonment of the work and entitles the contractor to recover reasonable compensation for the work actually performed." (Syllabus, *Canal Co. v. Gordon*, 6 Wall. 561 [1867].)

§ 152. Result of Abandonment by Contractor

"As the contractors abandoned their contract and never fully performed their agreements, and as the defendants suffered damages for that reason to a much greater extent than the amount of the reservation, the claimants are not entitled to recover the same, but it is forfeited to the defendants. It would have been otherwise had the United States sustained no loss or damage. . . . (Henegan v. United States, 17 Ct. Cl. 273 [1881].)

In another case a contractor, who, because of many difficulties was unable to complete a work in accordance with his contract, wrote the engineer to that effect, also stating that he relinquished all rights under the contract and also surrendered for use of the government all tools, machinery, etc., which he had used about the scene of operations. Suit was afterwards brought to recover the amount withheld on the part of the work which he had done and for the value of the machinery; etc., the work in the meantime having been completed by the government at a greatly increased cost. In denying his right to recover, the court in part said: "The contractor, by surrendering his rights under the contract . . . cannot avail himself of any benefit arising from his own default.

"Upon the relinquishment of his contract the liability of the contractor was not thereby extinguished. He had for a stipulated sum or sums obligated himself to furnish all the labor and materials necessary to complete the work covered by his contract; and, by the terms thereof, whether he continued the prosecution of the work or relinquished his

rights under the contract, he was bound to make good to the government the work thereunder at the price agreed upon and having failed in person to carry out his contract, for which the government was in no way responsible, he voluntarily entrusted the completion of the work under the terms of his contract to the government, who, with reasonable care and diligence, completed the work.

"Thus the position of the contractor is in effect held to be the same as though he in person had carried out his contract and suffered the loss of the difference between the amount of his bid and the actual cost of the work done. There is, however, this difference: Had the contractor completed the entire work according to the terms of his contract he would, of course, have been entitled to the full amount of his bid therefor, including the amount returned, together with his machinery and tools, but inasmuch as he relinquished his rights under the contract, and the government completed the work at great loss, he is in no condition to complain because the government diminishes that loss by the application of the money in its possession which accrued for work performed by him before the relinquishment of his contract, or for the money realized from the sale of the machinery and tools which he delivered to the government for the prosecution of the work under his contract." (McGowan v. United States, 35 Ct. Cl. 606 [1900].)

CHAPTER XVIII

DAMAGES

§ 153. Principles Generally Governing

Many of the principles governing the recovery of damages are applicable as well to government as to private contracts. Briefly stated they are:

1. In general, recovery may be obtained only for damages which are the proximate result of the action of the party at fault, there being no uncertainty between the cause and the damage. (*Myerle, Exr. v. United States*, 33 Ct. Cl. 1 [1897]; *Driscoll v. United States*, 34 Ct. Cl. 508 [1899].)

2. Where there has been a breach by one party the other cannot needlessly or voluntarily increase his damages. (*United States v. Wormer*, 13 Wall. 25 [1871]; *Yates v. United States*, 15 Ct. Cl. 119 [1879]; *Bitting v. United States*, 25 Ct. Cl. 502 [1890]; *Peck v. United States*, 14 Ct. Cl. 84 [1878].)

3. The contractor may recover damages even though his contract was being performed through subcontractors (*Stout, Hall & Bangs v. United States*, 27 Ct. Cl. 385 [1892]), payment by the contractor of the subcontractor's damages not being a prerequisite. (*Pneumatic Gun-Carriage and Power Co. v. United States*, 36 Ct. Cl. 71 [1901].)

4. The *prima facie* measure of damages for a breach of contract is the amount of the loss which the injured party has sustained thereby.

5. If the breach consists in preventing performance of the contract without fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct elements or grounds of damage, namely: first, what he has

already expended toward performance, less the value of materials on hand; second, the profits that he would have realized by performing the whole contract.

6. If the amount of profits is not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense;

7. If the claimant asks also for profits, then the rule applies as laid down in *Speed's case*, and his profits will be measured by the difference between the cost of doing the work and what he was to receive for it, etc. (*United States v. Speed*, 8 Wall. 77 [1868]; *United States v. Behan*, 110 U. S. 338, 344 [1884].)

8. The claimant's right of recovery is to be measured by his right at the time of abrogation. (*Cohen v. United States*, 15 Ct. Cl. 253 [1879].)

9. No allowance will be made for loss or injury to materials after a breach, if by reasonable care and prudence the contractor could have prevented such damage; damages must be proved and the court is not permitted to guess any more than a jury; like a jury, it must make its estimates from the proofs submitted. (*United States v. Smith*, 94 U. S. 214 [1876].)

10. If the United States refuses to accept goods tendered under a contract, the contractor cannot hold them until the price falls—or, if they are perishable, until they are injured—and then charge the government with the loss; and if he elects to keep the goods as his own he can recover the difference between the contract price and the market price at the time of the breach.

11. If he elects to sell he must do so within a reasonable time and after first giving notice of his intention to the other party, and he can then recover the difference, if any, between the contract price and that for which the goods are sold.

(*Guy v. United States*, 25 Ct. Cl. 61 [1889]; *Friedenstein v. United States*, 35 Ct. Cl. 1 [1889]; *Hughes v. United States*, 4 Ct. Cl. 64 [1868]; *Grover v. United States*, 5 Ct. Cl. 427 [1869]. See also 3 Ct. Cl. 404 [1867]; 7 *id.* 470 [1871].)

Certain other principles of the general law of contracts apply as well to government contracts, although officers of the government sometimes consider it their duty to construe every difference between the government and the contractor in favor of the government. The following cases are illustrative.

§ 154. Loss Due to Delay, Suspension, or Abrogation

If the contractor has been subjected to delay beyond the time specified in the contract and as a consequence is required to do the work in a more expensive way, the added expense is an element of damage. (*Kellogg Bridge Co. v. United States*, 15 Ct. Cl. 206 [1879].) Or if after he has remained in readiness to perform for a considerable period the government terminates the contract, the contractor would be entitled to full contract price of the service which he had agreed to render, provided that, as in the case of a transportation contract, the expenses connected with a readiness to perform are about the same as would be required in actual performance. (*Hardy v. United States*, 9 Ct. Cl. 244 [1873].) If the government has wrongfully put an end to a contract, it is estopped from denying that the contractor has been damaged to the extent of his actual loss and expense fairly incurred. (*United States v. Behan*, 110 U. S. 338 [1884].) If it becomes necessary, for the exclusive benefit of the government, to abandon work under a contract and otherwise depart therefrom, with consequent loss and damage to the contractor, and if a supplemental contract, providing for such changes, is entered into between the parties and approved by the Secretary of War, in which the damages to the contractor are agreed upon and fixed in a lump sum as a fair and just compensation for said damages

and in full liquidation thereof, payment of the sum so agreed upon is authorized. The contractor's profit on such abandoned contract and his loss resulting from additional expenses incurred by reason of such abandonment are proper elements of damage. (15 Comp. Dec. 439 [1909].)

§ 155. Increased Cost of Labor and Materials Following Delay

If a vendor is to manufacture goods, and, during the process of manufacture, the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damages is the difference between the contract price and the cost of performance. (Roehm v. Horst, 178 U. S. 1 [1900].)

In the event of delays or suspensions caused by the government, it will be liable for the contractor's losses due to a rise in the price of labor (Bitting v. United States, 25 Ct. Cl. 502 [1890]), or of material (Kelly & Kelly v. United States, 31 Ct. Cl. 361 [1896]), and for the value of the services of his employees and machinery during the delay, less the compensation actually received for their services from other sources. (Cotton v. United States, 38 Ct. Cl. 536 [1903].) The contractor may also recover his element of damage even though he resumed work when requested after a suspension, completed it, and received the amount provided for in the contract. (Figh v. United States, 8 Ct. Cl. 319 [1872].)

§ 156. Cost of Inspection Owing to Contractor's Delay

Sometimes a contract contains a provision that, in case the contractor fails to perform within the time stated therein, he shall be charged with the costs of inspection during the delay period. In the absence of such a provision in a contract such costs are not chargeable against the contractor if the inspec-

tion during the delay period in fact caused no loss to the government. Furthermore, it may happen that a contractor delays in making delivery of articles beyond a specified time and during the period of delay the government inspectors are also engaged in inspecting under other contracts of the same contractor, not delinquent. Thus they are not required by reason of the inspection of the delayed deliveries to work longer than if no delay had occurred. The cost of the inspection, is, therefore, no greater than if no delay had occurred, and the cost of the inspection of the delayed deliveries during the delay period is not "additional cost of inspection" resulting from the delay within the meaning of a provision in the contract that "any additional cost of inspection" resulting from delay in delivery of the articles called for beyond a specified time shall be deducted from the contract price. In such a case deduction of the cost of inspection is not authorized. (15 Comp. Dec. 103 [1908].)

§ 157. Decrease in Contract Quantity

The government cannot take advantage of a "more or less" clause in a transportation contract and secure an abatement of damages where it has failed to carry out its agreement in good faith. It will be held to the full measure of damages for the variation from the quantity stated in the contract. (Hardy v. United States, 9 Ct. Cl. 244 [1873].) In this class of cases where the government fails to provide the quantity of supplies for transportation which the contract calls for, the contractor is entitled to recover the cost which he has been put to in preparing to perform the unexecuted part of the contract and also for the profits which he might have made on such part, the latter being subject to reduction in some cases in consequence of the contractor's release from the care, risk, and responsibility which would have been incident to a full performance. (Cohen v. United States, 15 Ct. Cl. 253 [1879]; Field v.

United States, 16 *id.* 434 [1880]; Moore v. United States, 17 *id.* 17 [1881]; Power v. United States, 18 *id.* 263 [1883]. But see also Bulkley v. United States, 19 Wall. 37 [1873], a case in which the quantity of supplies to be furnished was entirely conjectural.) The contractor cannot, on the other hand, recover interest paid on money which he has been compelled to borrow because of delays by the government in making payments due under the contract. (McLaughlin & Co. v. United States, 36 Ct. Cl. 138 [1901]; 37 *id.* 150 [1902].)

§ 158. Recovery of Prospective Profits

Discussion of the recovery of prospective profits is fraught with difficulty, but the basic rule has been clearly stated by the Supreme Court in its opinion in the case of United States v. Behan, which has been quoted in a preceding section (§ 154) where this question is discussed at some length. This right to the recovery of prospective profits in those cases in which the government has unlawfully repudiated or rescinded its contracts has also been recognized by the Court of Claims in many cases, of which the following may be cited: Moore v. United States, 1 Ct. Cl. 90 (1863); Adams v. United States, *id.* 106 (1864); Wilder v. United States, 5 *id.* 468 (1869); Kellogg Bridge Co. v. United States, 15 *id.* 206 (1879); Myerle, Exr. v. United States, 31 *id.* 105 (1896); Monroe v. United States, 35 *id.* 199 (1900).

§ 159. When Prospective Profits Are Not Allowed

Prospective profits cannot be allowed as damages:

1. Where the parties have voluntarily relinquished their rights under the contract (De Groot v. United States, 1 Ct. Cl. 97 [1864]).
2. On articles not yet procured under a supply contract which obligates the government to accept but does not obligate the contractor to furnish large quantities

of one kind of goods or material as distinguished from a contract for the sale of a specific thing (Thompson v. United States, 9 Ct. Cl. 187 [1873].)

3. In a case where the injured party elects to rescind (United States v. Behan, 110 U. S. 338 [1884]).

Mutuality is an essential in all valid contracts and applies with particular force to such a situation.

§ 160. Exceptions to Rule as to Prospective Profits

But it has been held in a case where goods were to be manufactured, that recovery could be obtained of prospective profits on goods not manufactured at the time the government rescinded. (Moore v. United States, 17 Ct. Cl. 17 [1881].) Interest on money invested in material and on moneys improperly withheld are proper elements of damage where the contractor has been hindered and delayed by the government, contrary to the intent of their agreement. (Kellogg Bridge Co. v. United States, 15 Ct. Cl. 206 [1879].) The signing of an amendatory agreement which, providing for work already done, also contemplates a suspension, is not a release of profits to which the contractor may be entitled under the original contract which is kept alive by the new agreement. (Nourse, Jr. v. United States, 25 Ct. Cl. 7 [1889].)

§ 161. Distinction Between Penalties and Liquidated Damages

As used in connection with contracts, a penalty is a sum named in an agreement as security for damages which may be actually sustained in the event of a breach, and which must be proved before recovery is allowed.

Liquidated damages are damages, the amount of which in the event of a breach has been determined by anticipatory agreement between the parties.

The courts are frequently called upon to determine whether

a provision in a contract is to be treated as a penalty or liquidated damages. In some cases, where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; and conversely, where the contract has called it a penalty it has been held to be liquidated damages. Again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as it was right and reasonable. Where a party to a contract has an option, in effect, whether he will do or not do a particular thing, or where the subject matter of the agreement is of such a nature that damages could not well be proved or estimated, and the amount named seems a reasonable approximation to the damages which the other party might actually suffer from the non-performance, it will be held that the amount named shall be taken as liquidated damages. But where there is an absolute agreement to do a particular act, followed by a stipulation as to damages in case of a breach, if the nature of the transaction is such that there can be no inherent difficulty in ascertaining the actual damages, and the amount named in the contract is so excessive that it will not only make the other party whole, but form an exorbitant and unconscionable recovery, it will be held that the amount named should be regarded as a penalty. (Davis v. United States, 17 Ct. Cl. 201 [1881].) And neither the form of the agreement nor the intention of the parties shown there will control the court in its determination of the question. (Haliday v. United States, 33 Ct. Cl. 453 [1898]; Smith Co. v. United States, 34 *id.* 472 [1899].)

§ 162. Illustrative Cases

Percentages retained from payments due on a contract and to be withheld until completion of the work must be considered as penalties where their forfeiture is provided for upon

failure to perform. (*Kennedy v. United States*, 24 Ct. Cl. 122 [1889]; *Pigeon v. United States*, 27 *id.* 167 [1892]; *Satterlee v. United States*, 30 *id.* 31 [1895]; *Mundy v. United States*, 35 *id.* 265 [1900].) Similarly, clauses providing for forfeiture of certain sums for each day's delay in completion of performance are to be regarded as penalties and not liquidated damages where the actual loss or expense caused by the delay can be shown (*Smith Co. v. United States*, 34 *id.* 472 [1899]), or where the sum named is not based on actual damages. (*Haliday v. United States*, 33 *id.* 453 [1898].) But in a case where the contract contained a clause providing that a certain sum should be forfeited for each day's delay in the completion of a building, such amount being based upon "actual current expenditures" for rents made necessary by lack of the new building, the court held that the agreements provided for liquidated damages. (*Phoenix Iron Co. v. United States*, 39 *id.* 526 [1904].)

"An indemnity agreed upon as the amount to be paid for cancelling a contract, must, we think, afford the measure of damages for illegally refusing to award it" after the bid has been accepted. (*Garfield v. United States*, 93 U. S. 242 [1876].) Under a contract for a public utility where the damages that will be suffered by delay are uncertain and difficult, if not impossible of definite ascertainment, which contract is one of a number in connection with a public work, and which provides for the deduction of a specified sum per day, "as liquidated damages and not as a penalty, for each and every calendar day," time is of the essence of the contract, and the sum named was intended by the parties as liquidated damages for such delay, in order that a proper sequence might be observed in doing the work and in order that one contractor might not interfere with another. And the provision was so enforced. (16 Comp. Dec. 504 [1910].)

Where a contract does not provide for either a penalty or

liquidated damages for failure to complete within the time limit, the government, in the event of the contractor's default, may withhold the actual damages sustained, from moneys due the contractor. (15 Comp. Dec. 282 [1908].)

Where a clause in a contract relative to liquidated damages for delay in completion, is construed as not enforceable as such, the clause is sometimes referred to as a penalty, but only in the sense that in its application to the subject matter of the contract it is not a proper liquidation of damages, but operates as a punishment of the contractors. Actual damages are, therefore, charged because of the breach of contract to deliver within the stipulated time, and they are chargeable without limitation to the amount named in the attempted liquidation of damages. The contract which called out this decision contained a clause reading as follows: "In case you fail or neglect to ship the material within the time herein mentioned the total purchase price hereinbefore set forth shall be reduced in the sum of one dollar and eight cents (\$1.08), for each day such default continues, and such reduction is understood and agreed to be liquidated damages and not a penalty." The contract was for the furnishing of four different items of clothing and the Comptroller held that "It would be manifestly unjust to require the contractors to pay the same amount as damages for failure to ship within the time limit a part of the articles specified as for a breach of the whole contract, when the use by the government of said portion is independent of the shipment of the whole. . . ." (15 Comp. Dec. 701 [1909].)

Where the provision of a contract to the effect that "the party of the second part may . . . deduct as liquidated damages, and not as a penalty \$25 for each and every day's delay in completing the work" was meant to create a liability on the part of the contractor to pay such damages, and not to give a discretion in charging them nor an option in paying them, the words "*may* deduct liquidated damages" have the

same effect as if they read "*shall* deduct liquidated damages," and it will not be permitted the officers of the government to attempt to show that the default of the contractor has caused no loss to the government. (15 Comp. Dec. 359 [1908].)

The provision in a contract for constructing and delivering certain articles, stipulating for the deduction, as liquidated damages, of \$10 for each and every calendar day's failure on the part of the contractor to comply with the time of final completed delivery, is applicable to the delivery of the articles as a whole, and should be enforced as agreed upon for each and every day's delay in delivery until all the articles covered by the contract are delivered. (15 Comp. Dec. 277 [1908].)

§ 163. Statute as to Contracts of Treasury Department

It should be noted that while the above rules and decisions are applicable to government agencies and contracts in general, yet so far as the Treasury Department is concerned in its control over construction and repair of public buildings or other public works, a liquidated damage provision is made mandatory in every such contract by the Act of June 6, 1902. (See Appendix D.) But the Secretary at his discretion may remit any or all of such damages.

§ 164. Reletting Contract After Default; Withheld Payments as Security

Another phase of the subject of damages is the manner in which the government protects itself against the default of the contractor.

In the event of such default the government may relet the contract and the contractor cannot recover because of irregularity in the reletting, as, for instance, a failure to advertise for bids, unless he is able to show damage. And the percentage of payments customarily withheld may be applied on the cost of the work in order to assure its completion at

the original contract price. This principle has received the sanction of the Court of Claims in *Williams v. United States*, 28 Ct. Cl. 518 (1893). If, when the contract has been completed by the government or has been relet and completed by other parties, the government has sustained no loss by this change, the government will be liable to the contractor for the percentage of payment retained to insure proper performance. On the other hand, in the unusual event of a new contractor completing the work at a smaller price, the original contractor will not be entitled to the difference between the contract price and that for which the work was completed by others; in other words, he does not get the advantage of the saving. In reletting the contract, however, it must be borne in mind that if there is a loss to the government it cannot be passed back to the original contractor unless the contract as relet is the same as the original contract. (*Quinn v. United States*, 99 U. S. 30 [1878]; *United States v. Axman*, 234 U. S. 36 [1914].)

The case is on record of a contract providing that:

1. If the contractor failed to deliver goods when called upon to do so, the government should have the right to purchase the same in the open market and charge the difference in price, if any, to the contractor.
2. If goods delivered failed to pass inspection the government might require the contractor to replace them within a specified time by others which met the contract requirements, failing which the government would have the right to purchase others as required and as stated.
3. The right was reserved to the government of accepting inferior goods if the necessities of the service required such action, and making a reduction in the purchase price.

In its interpretation of this contract the court held that:

1. The provision permitting purchase in the open market upon failure of delivery was in the nature of a forfeiture clause, which if waived could not be re-asserted.
2. The government could not, without notice to the contractor of the rejection, go into the open market and purchase other goods and charge him with the difference in price.
3. The contract did not confer upon the government an arbitrary right to retain inferior goods at a reduced price, regardless of the necessity for so doing. *Dobson v. United States*, 31 Ct. Cl. 422 [1896].)

§ 165. Government's Right to Withhold Percentages

Several decisions governing the question of reserve payments or percentages and partial payments have been made by the Comptroller of the Treasury which are of interest in the guidance of both the contractors and disbursing officers of the government. It must be remembered, though, that ordinarily speaking, the warrant for the government so withholding payments is to be found in the contract itself.

"Where a contract provides for the retention of 10 per cent of the contract price for a period of 12 months from the date of acceptance of the whole work thereunder as a guaranty of said work, and the completion of the work under the contract was unreasonably delayed solely on account of the government's failure to perform its part of the contract, payment of such retained percentage may be made before the expiration of the said guaranty period upon approval of a supplemental agreement" which provides that such payment of the retained percentage shall in no way affect the guarantee as provided in the original contract. (15 Comp. Dec. 256 [1908].)

"Where a contract provides that the supplies to be de-

livered under it may be increased 20 per cent at any time during its continuance, at the option of the United States, and further provides for a reservation of 10 per cent from each payment until final settlement, no part of said 10 per cent reservation can be paid prior to the delivery and acceptance of any supplies required by increased orders given during the continuance of the contract." (15 Comp. Dec. 743 [1909].)

"Where a contract provides that at the end of each month 80 per cent of the proportionate estimated value of the work done during the month shall be paid to the contractor, and the balance to be paid on completion of the work after it is inspected and accepted, the word 'balance' refers to the monthly retained percentages, and no part thereof can be paid to the contractor until the work has been entirely completed as a whole and has been finally inspected and accepted by the government." (15 Comp. Dec. 55 [1908].)

"The withholding by the United States of moneys due a corporation under a contract with the government is not authorized as a set-off against the liability of said corporation to the United States for indefinite profits arising out of a timber trespass committed by another person although the corporation may have profited by such trespass." (15 Comp. Dec. 113 [1908].)

In one instance the government had an option in a contract to purchase the plant of the contractor and had exercised this right, though the money had not actually been paid to the contractor when the government annulled the contract. The comptroller decided that until the work was finally completed and the state of the account under the contract ascertained the government had the right to withhold the purchase price of the contractor's plant until the final completion of the work. (15 Comp. Dec. 199 [1908].)

CHAPTER XIX

BONDS AND SURETIES

§ 166. Payment of Sureties Performing Work After Default

Second only in importance to the rights of subcontractors and material men in such cases are the principles governing the rights and obligations of the sureties on the contract, and these may be best ascertained by a discussion of decisions.

In cases where a contractor fails to complete the contract work and a receiver in bankruptcy is appointed, but the contract is completely performed by the sureties without loss or damage to the government, payment for such work should be made in accordance with the following principles:

1. If the contractor performed no work and furnished no material and earned nothing under the contract, and the sureties completed the contract according to the terms thereof, and it was agreed that said sureties should receive therefor the original contract price, said sureties are entitled to the full amount of the contract price.

2. If the sureties undertook as sureties to complete the contract and performed all the work and furnished all the material, but no agreement was made with said sureties as to the amount they should receive for completing said contract, then the sureties are entitled to the reasonable cost, charges, and expenses thereof, including interest on money borrowed by them, provided that the total amount shall not exceed the original contract price, and if the amount should be less than the original contract price, the difference would inure to the benefit of the bankrupt's estate.

3. If the original contractor performed any labor in connection with the contract, or if the sureties used the plant or

any of the material of the contractor, the value of such labor or use of the plant or material should be paid to the receiver of the bankrupt contractor. (16 Comp. Dec. 351 [1909].)

§ 167. New Contract by Surety After Default

When a contractor fails after having given bond and partially performed the contract, and the surety of such contractor, instead of completing the contract in the name of the contractor, enters into a separate contract in its own name and on its own account, such surety is liable on the bond of the original contractor for any damages because of the failure of the original contractor to perform his contract, and is also liable for any damages because of a breach of the subsequent contract entered into by the surety in its own name.

Under such circumstances, upon final completion and acceptance of the contract work, the amount to be paid on both of said contracts cannot exceed the sum named in the original contract, and from this amount should be deducted any actual damages sustained by reason of the failure to complete the work within the time specified in the original contract, but in estimating the delay, time should not be included during which the government caused the delay.

Where a contract states that the contractor shall "forfeit" a stipulated sum for every additional day, "provided that the penalty shall not in any case exceed \$50 per day, the total penalty to be deducted from final payment," such terms must be interpreted as providing for a penalty and not for liquidated damages and therefore only actual damages sustained by the government are to be deducted from final payment. (16 Comp. Dec. 490 [1910].)

§ 168. Cases on Sureties

A surety of a contractor is not a party to an auditor's settlement of the contractor's claim, and is not entitled to request

a revision thereof by the Comptroller. (15 Comp. Dec. 754 [1909].)

In case the United States has procured judgment in a suit for a tort against a contractor, the set-off of the judgment against the contractor's claim for the contract price has been held to be a legal right as against any equitable right of the surety respecting the application of the contract price. The tort in the case under discussion was the destruction of government property by a fire caused by a forge of the company used in the work under the contract. The Comptroller held that under the provisions of the Act of March 3, 1875 (18 Stat. 481), it was the duty of the Secretary of the Treasury to withhold payment of such amount due the contractor for work done as would be sufficient to fully satisfy the judgment rendered against the company in favor of the United States. (15 Comp. Dec. 754 [1909].)

In the case of a certain annulled contract the work was completed by the surety company on the defaulting contractor's bond under a proposition submitted by the surety company and accepted by the contracting officer, to complete said work in accordance with the terms of the original contract. There was a period of delay in completion during which the time limit was waived. The court authorized, however, the deduction from the amount due the surety company, of the expenses of inspection and superintendence and all other losses to the United States due to that delay, as provided for in said original contract. (15 Comp. Dec. 444 [1909].)

In case the government purchases a contractor's plant, under the terms of a contract, and the contractor subsequently defaults, the government is under obligation to the sureties of the defaulting contractor to retain the price of the plant until the state of account between the government and the contractor is ascertained. Payment thereof prior to such ascertainment of account might defeat an action on the bond of such de-

faulting contractor to secure the amount due the government because of such default. (15 Comp. Dec. 199 [1908].)

In a recent case which illustrates some of the risks taken by sureties on contractors' bonds, the Supreme Court fixed the liability of the surety as the sum of the partial payments made on the contract as the work progressed and for which, as it is stated in the opinion, the government received nothing in return. In this case the building had been destroyed by fire during construction and was not rebuilt by the contractor, but the contract was relet to others by the government with substantial differences. (*United States v. United States Fidelity Co.*, 236 U. S. 512 [1915].)

§ 169. Effect of Modification of Contract on Surety's Liability

One other aspect of this proposition is of importance. The bond has been held as a general rule to contain a separate and distinct agreement between the material men and laborers and the sureties by which changes in specifications in the contract agreed upon between the government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability, when the general nature of the work and materials remains the same. (*United States v. National Surety Co.*, 92 Fed. 549 [1899].)

PART V
PROCEDURE

CHAPTER XX

STATUTORY REQUIREMENTS FOR ADVERTISEMENT

§ 170. What Contracts Must be Advertised

One of the most important contract statutes ever enacted by Congress is that which now constitutes Section 3709 of the Revised Statutes. (See Appendix D.) According to this, contracts for virtually everything furnished to the government, except personal services, are required to be made upon advertisement. The section applies to all of the executive departments though it has certain limitations when immediate performance is required by a public exigency.

The Act of July 5, 1884 (see Appendix D), which applies to Quartermaster's and Commissary's Department supplies, carries restriction still further and narrows bidding to public competition. Revised Statutes 3716 provides that advertisements for quartermaster's supplies must state that a preference will be given articles of domestic manufacture, everything else being equal. The General Supply Committee, established by the Act of June 17, 1910 (see Appendix D), for the purchase of fuel, ice, stationery, office supplies, and matters of a like nature for the executive departments and other government establishments in Washington, must advertise for such supplies, except when immediate delivery is required.

It should be noted that the requirement as to advertising has been modified in respect to purchases of limited amounts. These acts authorizing open-market purchases by the several departments will be found in Appendix D.

Section 3709, Revised Statutes, was originally enacted

March 2, 1861, at the outbreak of the Civil War, and by its terms and subsequent amendments was made applicable to virtually every government establishment. The statute has not been applied, however, to contracts made by the Panama Railroad Company, United States Shipping Board, Emergency Fleet Corporation, War Finance Corporation, and the other government-owned corporations. The capital stock of all these corporations is owned by the United States, and the corporations themselves are incorporated under the laws of the District of Columbia, so that ordinarily speaking, principles of law applicable to any other corporation apply to these government agencies. As there are no provisions of law requiring contracts with these corporations to be let upon bids and proposals their contracts have been let without such formality. This section was amended by Act of January 27, 1894 (28 Stat. 33), and the amendment was itself limited in the application by an Act of April 21, 1894 (28 Stat. 62). Finally, the amendment so limited was superseded by Act of June 17, 1910 (36 Stat. 531), which established the General Supply Committee.

It must be borne in mind that the exception as to emergency contracts takes out of the provisions of this statute a great many of the contracts let during the recent war, up to the date of writing, but as this book has been prepared principally for use after the war has ceased, and the tendency even during the war was to adhere more and more strictly to statutory requirements, it is considered necessary to go at length into this statute and its application when no emergency exists. The purpose of the statute is to invite competition among bidders, and it imposes a duty upon contractors to "Stop, Look, and Listen!" (17 Op. Atty. Gen. 84 [1881]; and 22 Op. Atty. Gen. 1 [1897].) The Supreme Court of the United States has defined this duty in the Floyd acceptances, 7 Wall. 666 [1868], when it said: "Our statute books are filled with

acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract, must look to the statute under which it is made and see for himself that his contract comes within terms of the law."

§ 171. Necessity of Advertisement

In the absence of an exigency of fact, such as the recent state of war, or of one determined by the officer in charge of public work, or of one that can be judically inferred, the provision of this section requiring advertisement for supplies is mandatory, and contracts made in violation thereof are void. (*Schneider v. United States*, 19 Ct. Cl. 547 [1884]; and cases there cited.)

§ 172. Exceptions to the Rule

As has been stated the effect of this statute is to require advertisement for bids in all purchases and contracts for supplies or services by the federal government, but there are certain well-defined exceptions, as follows:

1. Personal services.
2. When immediate delivery or performance is required.
3. When public exigency requires immediate commencement and there is no time for such advertising, even though there may be time for the execution of a formal contract.
4. When the subject of the proposed contract is neither service nor supplies; for instance, a lease for the rental of property.
5. When the articles are, by reason of being patented or copyrighted, procurable only from one source and no competition therefor can be had.
6. When by reason of other existing conditions it is impracticable or impossible to advertise.

7. Exceptions created by subsequent legislation. (See § 179.)

§ 173. Personal Service

A contract for "personal service" is one by which the individual contracted with renders his personal service to the government through its agents, thus himself becoming the servant of the government. (15 Op. Atty. Gen. 235 [1877].) Regarding such contracts several points have been noted. Although a contract may in some of its details require such personal service, this does not make the whole contract one for personal service within the meaning of this section. The personal service must be that of the person contracted with, and not personal service which he shall employ. (15 Op. Atty. Gen. 538 [1876]; *Smithmeyer v. United States*, 147 U. S. 342 [1893].) In all contracts for service which presuppose skill and experience, the public officer who employs the service must be allowed to exercise a judicious discrimination and to select such as, in his judgment, possess the required qualifications. It has been held, for example, that a contract for surveying Indian reservations is one for personal services and may therefore be made without previous advertisement for proposals. (10 Op. Atty. Gen. 261 [1862].)

§ 174. Immediate Delivery

The exceptions regarding immediate delivery and public exigency are to a certain degree related, and might be discussed together. They might be the subject of vexatious and long continued litigation in the courts, were it not for the fact that a number of decisions in the Supreme Court and in the Court of Claims afford fixed and well-defined rules for guidance. The Supreme Court in the *Speed* case, 8 Wall. 77, 83 (1868), lays down the law in these words: "It is too well settled to admit of dispute at this day, that where there

is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

In a decision by the Court of Claims, that of *Stevens v. United States*, 2 Ct. Cl. 95 (1866), it has been decided "that an officer in command may decide as to the existence of an emergency which will excuse the omission to advertise, and act upon his conclusions; and we will uphold his contract unless it is shown that the emergency was not real, or that the transaction was not one of good faith and the result of necessity." An exigency has been held to exist when from any cause that is necessary for the good of the public service the article should be procured or the service performed without any delay. (*Reeside v. United States*, 2 Ct. Cl. 1, 51 [1866].)

The Court of Claims has in fact gone so far as to hold that where an exigency actually exists another contract may be made without advertisement, even though there is in existence a contract for the same article. In this particular case the Surgeon-General of the Army had made a contract in pursuance of the usual form of advertising for proposals, but as the articles contracted for, hospital stores, were not available and an exigency actually existed, a contract for such articles made by a medical purveyor acting under the orders of the Surgeon-General without advertisement was upheld.

§ 175. "Public Exigency"

Subject to the war orders and the conditions mentioned in § 172, the "public exigency" contemplated by this section is one of time only. While the officer entrusted with making the contract may be entitled himself to adjudicate whether or not the facts are such as to require immediate delivery of the articles contracted for, or the immediate rendering of

the service desired, yet the exigency cannot be extended beyond that of time only, and if he adjudicates any other state of facts to be an exigency, he is not proceeding within the authority given him by law. (15 Op. Atty. Gen. 253 [1877].) The power here given to make contracts, without advertising, plainly contemplates only such contracts as the urgent necessities of the service may demand and in cases where the public interests would suffer by the delay attendant upon advertising. The only exception is when "immediate performance" is required by the public exigency, and that is the test by which the necessity of advertising is to be determined. (10 Op. Atty. Gen. 28 [1861].) "Immediate delivery," under this act, requires of a quartermaster that openness, diligence, prudence, and care which an individual might be supposed to exercise where he is buying goods in just such an exigency and under just such circumstances. Therefore, when a quartermaster buying goods under extraordinary circumstances, does as an energetic business man would have done in his own business, the conditions of the statute are fulfilled. (Child v. United States, 4 Ct. Cl. 176 [1868].)

In reference to such articles as are wanted for use so immediately as not to permit of contracts by advertisement, purchases in open market may be resorted to. (4 Op. Atty. Gen. 475 [1846].) The article required must be obtained in this case by open purchase, that is by purchase at the place where articles of the description are usually bought and sold, and in the mode in which such purchases are ordinarily made between individual and individual. (2 Op. Atty. Gen. 257 [1829].)

§ 176. Military Emergency

On the other hand, a military emergency cannot be measured by precise rules, but may continue equally imminent over a period of months. In such case, where supplies cannot be

procured by immediate purchase, literally in the open market, and the quartermaster charged with procuring them contracts without advertisement for their delivery within 30 days, the contract is valid, if it be as immediate a purchase as the circumstances admit of. (*Thompson v. United States*, 9 Ct. Cl. 187 [1873].)

Thus, it has been held that in the case of great public exigency and peril, a contract for the immediate construction of 100 railroad cars at an agreed price, 50 to be delivered in 18 days, and 50 in 30 days, calls for an immediate performance within the meaning of this section. (*Mowry's case*, 2 Ct. Cl. 68 [1866].) This statute intends that in a proper exigency, supplies for the army should be procured by lawful means, i.e., in a public open manner and with as near an approach to direct competition as circumstances permit. It was never intended to be construed as declaring contracts illegal which as nearly as possible comply with requirements. Statutes which relate to national exigencies must be liberally construed. (*Child v. United States*, 4 Ct. Cl. 176, 193 [1868].)

It must not be forgotten, however, that even where the present emergency dispenses with the necessity of advertising, Congress has recently enacted a substitute when it placed words in Chapter I, of the Act of Congress, approved July 9, 1918 (*Army Appropriation Act*), as follows: "Provided, that where practical so to do, no work is to be done or contract made under or by authority of any provision of this act on or under a percentage or cost-plus percentage basis, nor shall any contract, where circumstances so permit, be let involving more than \$1,000 until at least three responsible competing contractors shall have been notified and considered in connection with such contract and all contracts to be awarded to the lowest responsible bidder, the government reserving the right to reject any and all bids."

§ 177. The Time Element Important

A contract for purchase from a middleman of naval supplies for immediate use, at a higher price than the manufacturer's price, is not a violation of this section where there was not sufficient time to learn the place of manufacture, and the manufacturer's price and public exigency demanded immediate delivery; and the contractor may recover the contract price, although he did not deal in or possess such articles at the time of the sale. If, however, there be ample time to learn the manufacturer's price and the place of manufacture, and the contractor and purchasing agent do not avail themselves of the opportunity, only a fair and reasonable value for such articles can be recovered by the contractor, without regard to the contract price. (Wentworth's Case, 5 Ct. Cl. 302 [1869].) A contract without advertisement for a future supply of wood for the use of the army is within the prohibition of this act and therefore void. (McKinney's Case, 4 Ct. Cl. 537 [1868].) And the Secretary of War may not under this section, without advertising for proposals, make a contract involving the expenditure of nearly \$200,000 and requiring years for its execution (10 Op. Atty. Gen. 28 [1861]), except of course under authority of legislation enacted by the War Congress. And even here, the Act of May 12, 1917, in the matter of purchases of transportation equipment by the Quartermaster-General, provides that advertisement can only be omitted in cases of "extreme emergency."

§ 178. Discretionary Powers

There have been particular instances of purchases where immediate delivery was not required and no public exigency existed, but these have been in pursuance of some special statute. Such was the Act of March 2, 1861, which specially confided the expenditure of an appropriation to the discretion of the Secretary of the Interior. In construing the terms of

that particular act the court held that the secretary had discretionary power to award contracts in pursuance of that act without advertising.

Officers of the government, and especially those of the War Department (see Act of July 5, 1884, in Appendix D), are required to report such emergency contracts immediately to the Quartermaster-General, and the purchasing officer must always certify to the emergency and to the lack of time. (3 Comp. Dec. 470 [1897].) That the officer in question has not so certified will not invalidate the contract in so far as the rights of the contractor are concerned as between himself and the government, but this decision also imposes obligations other than contractual upon the contractor. Should the character of the articles purchased, the nature of the necessity for them, or the fact attending the purchases, be plainly not within the category of a public exigency then the contract will be void and upon its execution the contractor will be compelled to recover upon the basis of a *quantum meruit*.

§ 179. Other Exceptions

Of the other exceptions noted in § 172, the fourth point requires no explanation. The fifth point is also plain. Obviously where it is desired to use a copyrighted or patented article whose sale and distribution is controlled by a single firm there can be no competition between that firm and other persons; in such a case advertising may be dispensed with. (17 Op. Atty. Gen. 84 [1881].) Even here, however, recent commandeering legislation protects the government in regard to price.

The application of the sixth point, however, is not so clear. Some idea of what the conditions are under which it is impracticable to advertise may be obtained from the interpretation of this matter in writing by the Post Office Department saying that advertisement for the purchase of supplies for

this department may be dispensed with under the section under discussion, in the following cases:

1. When under a formal contract for construction there arises a necessity for additional work practicable of performance only by the contractor.
2. When there is only one dealer within a practicable distance from whom the articles can be obtained.
3. When prices or rates are fixed by legislation, either federal, state, or municipal; or by regulation.
4. When previous advertising for the identical purchase has been followed by the receipt of no proposals or only of such as were unreasonable, and under circumstances indicating that further advertising would not alter results.

Revised Statute 3718 (see Appendix D) amends Revised Statute 3709 (see Appendix D) as to advertising necessary for certain articles for the navy, and the Attorney-General has decided that advertising required by Section 3709 is not to be limited to the District of Columbia. (21 Op. Atty. Gen. 181 [1895], 595 [1897].)

§ 180. Contractor Need Not Advertise

The prohibition upon the officers of the United States to obtain articles or service except by "open purchase or contract at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals" does not apply to a contractor with the United States. (15 Op. Atty. Gen. 253 [1877].) That is to say, the contractor is not so limited in his purchases or dealings with other citizens or subcontractors.

§ 181. Manner of Advertising

The Attorney-General in decisions to be found in 15 Op. Atty. Gen. 226 (1877), and 21 Op. Atty. Gen. 595 (1897),

has construed this section to mean that no particular form of advertising is required and that the manner of advertising has been left by the law to the discretion of the executive officer of the department advertising.

The Attorney-General has limited the field of bidders by stating, in reply to a question referred to him by the Postmaster-General for an opinion, that the Postmaster-General—and this applies to the heads of other departments similarly situated—can limit his proposals to those who are able to do the work or furnish supplies which he needs in his department.

In such a matter, the Postmaster-General can “exercise his own discretion as to that which will be for the best interests of the public and will carry out the policy of the statutes by thus limiting his advertisement, when he shall deem it expedient so to do. If knowing the articles needed and knowing that they can be supplied only by particular classes of persons, he sees fit to limit his advertisement to them, he may properly do so. Contracts thus made will not ordinarily be the subject of traffic or of transfer, but will be performed by those with whom they are made.” In the case in which the inquiry arose, if the Postmaster-General, deeming that the article which he desired, to wit, postage stamps, could only be supplied by steel plate engravers or plate printers, saw fit to limit his advertisement to them, he might properly do so. (15 Op. Atty. Gen. 226 [1877].)

§ 182. Various Methods

The Comptroller of the Treasury has decided in an opinion to be found in 3 Comp. Dec. 175 (1896), that the advertisements specified by the statute need not necessarily be by publication in the press, but can take the form of circulars sent to persons engaged in the particular business to be performed, or in furnishing the supplies desired, accompanied by posting

handbills in the proper localities, or by other means of giving publicity. Telegraphic inquiries, of course, would come within this decision.

§ 183. Proposals Addressed to Those Competent to Perform

Contracts are to be performed, however, as is indicated by other sections of the statutes, by those who make them, and are not to be the subjects of traffic or transfer. (Revised Statutes, Section 3737. See Appendix D.) For instance, by Section 3722 of the Revised Statutes (see Appendix D), it is provided that in the procurement of naval supplies "no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he engages to supply." It therefore follows that proposals should be addressed to and contracts made with those who, from their capacity, are competent to render the service to be performed, or from their business, are able to furnish from its resources that which they contract to supply.

CHAPTER XXI

BIDS

§ 184. Bid or Proposal

The heads of the departments are authorized and it is the practice for them to prescribe rules and regulations for the preparation, submission, and opening of bids relating to their respective departments.

Bids may be required to be accompanied by a written guarantee; if the bid is accepted, but the bidder fails to enter contract, suit for damages may result. In the case of the Secretary of War this provision is based upon the Act of April 10, 1878. (See Appendix D.) This custom of requiring a guarantee or bid bond, whether based on statute or departmental regulation, prevails generally throughout the government departments and, in practice, is observed by many contractors by filing with the department or departments with which they do business an annual bid bond. For example, in the purchase of Indian supplies, if these amount to over \$5,000, such guarantee is mandatory. (Act of March 3, 1875.)

§ 185. Bidder Should Observe Instructions

Where proposals are invited and directions are issued as to how they should be made and what they should contain, it is necessary that such rules and instructions should be carefully observed by the bidder. Mere informalities may not cause or justify a rejection of a bid, but any substantial variation or omission will be fatal. In this connection it has been said: "The authority to invite proposals implies an authority to prescribe reasonable terms and conditions. To announce

under this authority that no bid will be considered which does not comply with certain directions, and afterward to consider and accept a bid not complying with such directions, is unjust to the complying bidders. I am aware that the rigid rule which I advise has not always been observed, and that authority for somewhat flexible practice in the matter of bids may be found in opinions by my predecessor. But I can see no propriety in announcing terms unless they are to be insisted on; and when, as in this case, they are authorized by law, I think that the officer or public agent who prescribes them is not at liberty to disregard them, and that he should consider that person the lowest bidder, who makes the lowest bid according to the prescribed forms and terms." (13 Op. Atty. Gen. 510 [1871].)

It happens, to be sure, that the strict construction of the law and regulations favored by the distinguished Attorney-General has not always been adhered to by his successors, and it is now generally recognized that the head of a department may waive formal defects in bids and bonds in order to secure the public advantage resulting from competitive bidding which it was the intention of Congress to secure. However, the careful bidder will do well to follow the strict construction of the law since the department head is not required to waive informalities, though he may be authorized to do so. Moreover, even though he may exercise his discretion in this regard it will be apparent that he will not be influenced in any degree by considerations other than those of the government's interests.

§ 186. Opening of Bids and the Award

While as has been stated, Section 3709 may be said to be the groundwork of the statutes designed to give the United States the benefit of competition between those desiring to furnish supplies or render services, yet other laws have been

passed authorizing the making of such regulations regarding bids, etc., as the heads of the departments may deem necessary. Of this group of acts it has been said:

"These statutory provisions provide a uniform system for the purchase of supplies. They embrace all the requirements to secure their object. They contemplate the advertising for proposals by competitive bidders, a fair and impartial opening and comparison of the bids, and an award by competent authorities."

The opening of bids in the presence of bidders and matters connected therewith are provided for in Revised Statutes, Section 3710. (See Appendix D.) "Parties . . . shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and record of each bid shall then and there be made."

It is needless to add that the head of a department, unlike a private person, does not have an arbitrary right of selection of the bidder to whom an award will be made.

The award must be "to the lowest responsible bidder." This responsibility is not confined to pecuniary responsibility; in fact, as to the Navy Department this particular feature is covered by Section 3722 of the Revised Statutes. A discretionary power must to a certain extent be reposed in the authorized officer to judge of the quality and utility of the article or service offered. The lowest bidder who, in other ways, meets the requirements, would receive the contract, although these facts should be determined by the head of the department or the officer acting under his authority, and his decision may not be reviewed by the court. (Revised Statutes, Section 3710. See Appendix D.)

§ 187. Right to Modify or Withdraw Bid

The well-settled principle of the law of private contracts, that a bid may be revoked or withdrawn at any time before its

acceptance, applies also to government contracts, *in the absence of any statute or regulation to the contrary*. (9 Op. Atty. Gen. 174 [1858]; 15 Op. Atty. Gen. 649 [1877]; 21 Op. Atty. Gen. 56 [1894]; 22 Op. Atty. Gen. 45 [1898]; *Mayer v. United States*, 51 Ct. Cl. 317 [1869].) Emphasis must be placed on the word "acceptance" since the mere opening of bids with its consequent disclosure of the lowest bidder does not of itself deprive such bidder of his right to withdraw. The bid must be actually passed upon and accepted to terminate the privilege. It quite naturally follows that a withdrawal of his bid by the lowest bidder does not release the other bidders and the contract may be awarded to the one among them whose bid is lowest. Where the lowest of several bids is rejected because the required bond and security is not furnished, the next lowest bid which is not unreasonable may be accepted, and a contract made in accordance therewith is valid. (*Thompson v. United States*, 3 Ct. Cl. 433 [1867]; 15 Op. Atty. Gen. 648 [1877].) It has also been held that "a bidder under an advertisement for sealed proposals has the right, previous to the opening of the bids, to modify his bid by telegram, and when so modified, upon acceptance before withdrawal, would bind the bidder." In the decision of the Attorney-General (22 Op. Atty. Gen. 45 [1898]), it has been stated in this connection that "while it is customary to confirm by letter the telegraph proposition, such confirmation is not essential."

§ 188. Irresponsible Bidder May be Rejected

It is also provided in proposals for government contracts that the right is reserved "to reject any and all bids," but this authority can be exercised only in conformity with the obligations imposed by the statute. The Attorney-General has said: "It is not a right arbitrarily or capriciously to reject any bid. If the bid is excessive, or if the bidder is not a

responsible person, as if for instance he had previously been in default on other contracts, the right to reject exists. . . .

The system is defined and restricted by the terms of the statutes. The exceptions to the mode prescribed are only where an emergency exists arising from a public exigency or a shortness of time. To impose other restrictions upon this procedure of purchase or the qualification of bidders or the manner of award, would be to import into the act authorities which can only be established by legislative act, and are therefore beyond the office of departmental regulation.

"The authority to make rules and regulations conferred by the Act of 1878, is to make such administrative regulations as are necessary to carry out the existing law. The right is not given to amend or enlarge the law. To restrict bidders to a certain class, or to exclude a certain class from the right to bid, is not within the provisions of any existing law. If Congress could delegate this power, it certainly has not done so by the statutes herein cited." (28 Op. Atty. Gen. 384 [1910].) It is interesting to note in this connection that as stated not only has the Navy Department had confirmed to it this right of limiting bidders to those responsible, but at a recent date the War Department has created a division for the purpose of keeping a record in the nature of credit reports on bidders on government contracts.

§ 189. Bid Must Conform to Advertisement and Specifications

What has been said in § 185 regarding the possibility of overlooking purely formal defects in bids, does not apply to points that are essential unless covered by the act of Congress validating informal contracts.

In one case an advertisement was published by the War Department calling for proposals for performance of certain work for the government with the specification that it be begun on or before October 1, 1892, and be concluded on

or before December 31, 1893. One of the proposals for this piece of work stated, however, that the bid was that the entire work would be completed on or before June 1, 1894. This bid was accepted by the Chief of Engineers and the bidder so informed but no formal contract was signed. The Attorney-General subsequently held not only that no contract was made under Section 3744, Revised Statutes; but further, that the modifications made in the proposals were inconsistent with the specifications and in contravention of the purpose, spirit, and intent of the statutes authorizing the letting of contracts upon advertisement. In the course of his opinion the Attorney-General said: "The fairness of contracts upon advertisement, specifications, and competition requires that all bidders shall, as to all matters of consequence, those which affect the cost of the work and the amount of expenditure required to be used in performing it, be subject substantially to the same terms and conditions," and then after referring to Army Regulation No. 639, which says that "slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid," he continued: "The taking by a bidder without the knowledge of his competitors, of one-third additional time in which to perform an important and expensive improvement, which from its nature must require a long period is not, in any sense, the slight failure to comply strictly intended by this regulation. The change made in this case is not a mere informality; it is a radical departure from the proposed terms of the contemplated contract."

§ 190. When Award Is Not a Contract

It must not be forgotten that until an award is actually made under a bid there is no contract. (*Strong v. United States*, 6 Ct. Cl. 135 [1870].)

On the other hand, it should be remembered that the law

requiring contracts to be in writing and signed by the parties, by its terms applies only to the Departments of War, Navy, and Interior.

§ 191. When Award Is a Contract

As to the other departments, it may be said that an accepted proposal constitutes a valid contract binding upon both parties, even though it was the custom and in contemplation of the parties that the terms agreed upon would be reduced to a formal written contract and signed.

Such in fact were the conditions surrounding many of the so-called informal contracts of the war period which necessitated the passage by Congress of the recent legislation validating those contracts. This subject is treated in detail in Chapter XVII on cancellation. The case of *Garfield v. United States*, 93 U. S. 242 (1876), settled the law on this point; it has been followed without question in all government contract cases since its rendition.

Although it is an invariable custom in the Post Office and other departments to have agreements which are evidenced by advertisement, bid, and acceptance or award, reduced to a formal, written contract, such action is not, unless it is required by law, prerequisite to a valid, binding agreement, from which the contractor may not withdraw. The views of the Attorney-General on this subject were thus expressed in an opinion rendered to the Postmaster-General (15 Op. Atty. Gen. 226 [1877]): "The award made was, according to the terms of your inquiry, in the usual form, and its transmittal indicated the acceptance of the proposal, as well as the award of the contract, by the Postmaster-General. By such an award it must be deemed that the Postmaster-General has passed upon all the questions which it was his official duty to pass in making it. Such award, with its transmittal, was in the nature of the acceptance of an offer. That an offer made and accepted

constitutes, between parties competent to contract, a contract, is entirely clear.

"Such a transaction is not the less a contract because at some time after signing the award and transmitting it the Postmaster-General determined to recall it." Whether this time was the same afternoon or the next day is unimportant. It was not, in fact, recalled until information of the acceptance had been transmitted to the parties who had made the bid. The award was transmitted in the usual course of business and when received by the party whose offer was accepted, the contract was complete. The award thus made was in the nature of a preliminary contract, but it was not the less, therefore, a contract. It provided that the bidder, within ten days after being called upon to do so, should execute a more formal contract."

§ 192. Notice of Award Must Actually Reach Bidder

Another important decision relating to the effect of acceptances of bids is that of *Haldane v. United States*, 69 Fed. 819 (1895). Quoting from the syllabus in that case:

"The officers of the Quartermaster's Department of the United States army advertised for proposals for furnishing a quantity of hay, such proposals being required by a circular issued in connection with the advertisement to be accompanied by a guaranty that the bidder would not withdraw his proposal within 60 days, and that if the proposal were accepted, he would enter into a contract within 10 days after the day on which he should be notified of such acceptance. *Held*, that personal notice of the acceptance of a bid was intended by the terms of such circular, and that a notice of the acceptance of a bid which was deposited in the mail a few days before the expiration of the 60 days, but did not reach the bidder until after the expiration thereof, was insufficient to render him or his guarantors liable for a failure to enter into a contract.

"Held further, that the insertion of the clause in the circular requiring that the bids should not be withdrawn for 60 days was a determination that that period was a reasonable time for the bids to remain open, and that the government had no right to accept a bid after the expiration of 60 days."
(See also 15 Comp. Dec. 867 [1909].)

CHAPTER XXII

REFORMATION FOR MISTAKE IN BID

§ 193. Formal Errors and Errors in Calculation

Mere formal errors which in no substantial way affect or alter the terms of the bid or the intention of the party, may be waived by the head of a department or the officer authorized by him to enter into the contract, and as a matter of fact it is customary for the government expressly to reserve the right so to do. But errors which are due to a bidder's failure to consider properly all the elements composing the work for which proposals are invited or which arise from faulty arithmetical processes or clerical mistakes resulting in false totals, are of a far more serious nature. If they materially increase the amount of the bid the contract will most likely go to another bidder. If the error has reduced the intended and proper amount to a figure below actual cost of performance, the best that the bidder can look for is to be allowed to withdraw from the competition or withdraw his bid before the award is made. The officers of the government would have no authority to correct the mistake and the courts would probably refuse to compel them so to do. As a matter of law the only justification for allowing such a bid even to be withdrawn is that the mistake destroys an essential requirement of a valid contract, namely that the minds of the parties must meet. Of course if there is no valid contract there can be none to correct or reform.

§ 194. Reformation for Mutual Errors

If the mistake is mutual and common to both parties to the instrument the courts will correct it so as to make it conform

to the real intentions of its makers, but a brief study of the reported cases and text-books discloses that the authorities are far from agreeing on the conditions under which reformation or rescission of a contract will be ordered for the mistake of one party. This is well illustrated by the history of the case of *Moffett, Hodgkins & Clarke Co., v. City of Rochester*, the facts in which were briefly as follows: The city had invited proposals for constructing a public work. At the time the bids were opened, complainant notified the executive board in charge of the intended work that its proposal contained several errors which together reduced by thousands of dollars the amount which it had intended to bid and requested permission to make correction; this was refused. There being a provision of the city charter to the effect that a bid could not be withdrawn until after the contract had been let for which said bid was made, the executive board therefore offered, or forced upon, complainant the alternative of taking the contract at an unremunerative price, or the payment of \$90,000 as liquidation damages. It then ordered him to appear at a certain time and sign a formal written contract, or, by failure to do so, be considered in default.

§ 195. Rescission for Error of One Party

Before the time set complainant filed his bill in the United States Circuit Court with the prayer that the court decree either a reformation or rescission of the proposal made. The court decreed rescission (82 Fed. 255 [1897]), saying in the course of its opinion: "It is argued that the mistakes were not mutual and, therefore, that there is no ground of equitable cognizance. It should be remembered, however, that the complainant does not seek to reform a contract but to be relieved from an unconscionable bid by its rescission or cancellation. Equity cannot reform an agreement unless both parties were mistaken, but it can interfere to prevent the enforcement of

an unjust agreement induced by the mistake of one." The city appealed the case to the United States Circuit Court of Appeals and the decree of the lower court was reversed (91 Fed. 28 [1898]), the court saying: "The statutory powers of courts of equity to rescind or reform contracts which do not express the real intention of the parties is not to be extended to cases where the contract, because of the mistake of one of the parties, fails only to express the meaning of that party, and he seeks relief purely on the ground of his own mistake . . . and there is no sound reason, and, as we think, no well-considered authority, for the proposition that, although a court of equity will not reform a contract except for the mistake of both parties, it will rescind one merely for the mistake of one."

This time it was the bidder's turn to appeal, and so he did to the Supreme Court of the United States. The decision of that court held the Circuit Court decree to be right and affirmed it, at the same time reversing the Circuit Court of Appeals. (178 U. S. 373 [1900].) In the opinion of the Supreme Court, the transaction had not reached the degree of a contract—a proposal and acceptance—when the mistake was discovered and declared, nor had the city done anything to alter its condition. A similar view of the law is expressed in Page on Contracts, Chapter LXXXVI. "If the offeree knows that the terms of the offer do not express the real intention of the offerer, and the offeree seeks to take advantage of such mistake by accepting the offer, no contract exists."

§ 196. Reformation and Rescission

In the case of *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 490 (1874), the court made this statement in regard to the general exercise of this power: "The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this

power are founded on good sense and are well settled. Where the agreement as reduced to writing omits or contains the terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

"The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual, and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract and hence none to be rectified." (See also *United States v. Melliken Imprinting Co.*, 202 U. S. 168, 176, 177 [1906]; *Cramp v. United States*, 239 U. S. 221 [1915]; *Ackerland v. United States*, 240 U. S. 531 [1916].)

§ 197. **Opposite Opinions of Attorney-Generals**

The Attorney-General of the United States is the legal adviser of the heads of the executive departments and it would be to him that questions of this kind would be first referred. The Secretary of Navy in one instance sought light on this very question and was given this opinion by the then Attorney-General: "I do not understand that the bid has been accepted; but if it has been, it would not be binding on the Western Electric Company, being made under a mistake of fact. If, therefore, the fact be that the bid was made under a mistake of fact, it is no bid at all, and ought not to be considered." (20 Op. Atty. Gen. 1 [1891].) A few years before this, an equally distinguished lawyer holding the same office gave this advice to the Postmaster-General: "The question, then,

resolves itself into the right of a person to withdraw from a contract upon the ground that he made a mistake in stating the terms to which he agreed. It is quite clear that no such right can be recognized with safety by an executive department of the government, for to do so would simply be to invite the commission of grave frauds upon it. I have therefore no hesitation in advising you that it is your duty to require the execution of the contract in question according to its terms, and that you are not at liberty to allow the contractor to withdraw from it upon the allegation that a mistake was made in the proposal submitted." (And to the same effect see 21 Op. Atty. Gen. 186 [1895].)

§ 198. Contractor Must Exercise Great Care

Where the terms of a written contract required the supplying of a smaller quantity of material by a contractor than the advertisement and his accepted bid in response thereto had obligated him to furnish, the court held that having entered into the written agreement voluntarily and without mistake, he would be bound by its terms and could not recover as upon an implied contract, the greater profit which he would have made had he been allowed to supply the amount of stone named in his bid. Quoting from the opinion of the court: "In the case of *Clark v. United States* . . . there was no written contract and for that reason the court held in substance that where the property or services of an individual were taken and the United States received the benefit thereof, such individual would be entitled to recover the fair value thereof as upon an implied contract for a *quantum meruit*. In other words, where the government receives the benefits of the property or services of an individual the party so furnishing should not be denied the right of reasonable compensation therefor, because the formalities of the Act of June 2, 1862, had not been complied with. But that decision does not

apply where the quantity of material, determined by the engineer officer in charge, is made part of the written contract as in the present case. The contract having been reduced to writing and signed by the contracting parties, the liability of the government must be measured thereby." (Sanger & Moody v. United States, 40 Ct. Cl. 47 [1904].)

Considering such great diversity of views among legal authorities, it is obvious that the contractor's one safe course is to exercise the greatest care in the preparation of his bid, make no mistakes, and thus avoid costly and possibly disastrous litigation.

CHAPTER XXIII

APPROVAL OF SUPERIOR OFFICER

§ 199. When Approval Is Necessary

To say that in all cases after a particular officer or agent of the government has made a contract the approval of a superior officer is required, would be inexact. Different departments have different regulations, contract forms, and methods of procedure. In some instances statutory directions make such approval absolutely necessary. (Act of April 28, 1904; see Appendix D. See also *Thompson v. United States*, 9 Ct. Cl. [1873]; *Knitting Mills Co. v. United States*, 44 Ct. Cl. 1 [1908]; *Cathel v. United States*, 46 Ct. Cl. 368 [1911].)

Ordinarily the contract itself gives evidence of whether or not the approval of a superior officer is required and what the designation is of that particular officer, so that in most instances the contractor by reading can determine for himself whether or not the contract requires approval of any other officer than that of the officer making it. Should the approval of a superior officer be required that approval can be evidenced on the document itself. It has also been held that a letter expressing satisfaction with the progress made under a contract constitutes in itself a valid approval. (*United States v. Speed*, 8 Wall. 77 [1868]; *Floyd v. United States*, 2 Ct. Cl. 429 [1866].)

§ 200. When Approval Is Implied

In fact, such approval was inferred in one case where the contractor was, almost from the date of the contract and for 75 days thereafter, necessarily employed in the direct perform-

ance of the duties he had engaged to perform under the contract before any action was taken by the officer whose approval was required. The court held that the necessity of immediate performance must have been known to the approving officer, here the Quartermaster-General, and that good faith demanded that formal approval, if required, be given or refused without delay. But the fact should not be lost sight of that in this case the approval was not, as is now customary, required in writing; nor was there any time agreed upon within which it should be exercised. (*Wilder v. United States*, 5 Ct. Cl. 468 [1869]. See also *Tenney v. United States*, 10 Ct. Cl. 269 [1874].)

§ 201. Express Approval Should be Secured

Inaction, however, is not a safe rule to follow, since in one instance where a period of 12 days had elapsed after the contract had been submitted to the Quartermaster-General the court held that such time was no more than reasonable in which to make such inquiry and investigation as would be necessary in order to determine what action should be taken in the premises. In this particular case the contractor had already started work. He was paid for the amount performed according to the terms of the contract, but the court denying his rights to recover profits as though there had been a breach, said that when a contractor begins work before approval he does so at his own risk. (*Darragh v. United States*, 33 Ct. Cl. 377 [1898].) Other cases of interest as to special points on approval are: *Akers v. United States*, 2 Ct. Cl. 375 (1866); *Mitchell v. United States*, 19 Ct. Cl. 39 (1884); *Monroe v. United States*, 184 U. S. 524 (1902).

These decisions hold respectively that a purchase made upon valid order of one officer is not subject to disapproval by another of inferior rank, who passes upon the purchase; that where a contract requires the approval of two superior officers

and is so approved, it could not be altered by an officer inferior to them in rank; that a letter written by the chief of a bureau directing the acceptance of a bid, does not constitute an implied approval of the formal contract subsequently drawn up which in turn requires his approval.

§ 202. Ratification by Acquiescence

In applying the law of agency to government contracts, the courts have recognized the principle of ratification by refraining from disapproval and have held that ratification by the head of an executive department, or other responsible officer, could render a contract effective and valid which otherwise would be unauthorized and inoperative. Thus where the authority of an officer to order changes in the amount of work being done under a government contract is questioned, "neither by his successor, under whom a large part of the work was done, nor by his superior, the Chief of Engineers, who exercised an official and professional supervision of his proceedings, nor by the Secretary of War, who ultimately had the matter of this extra work brought to his personal notice, this acquiescence on the part of high officers of the government, in whom the power of ratification undoubtedly was, coupled with the facts of acceptance and payment and extension of the time wherein the claimants might perform it, constitutes ratification." (*Ford v. United States*, 17 Ct. Cl. 60 [1881].)

Other instances of ratification have received the approval of the court and the doctrine has been clearly stated in a leading case on the subject, that of *Reeside v. United States*, 2 Ct. Cl. 1 (1866), heretofore quoted, which case was affirmed by the Supreme Court of the United States, though their decision was not reported except as it appears in 7 Ct. Cl. 82 (1868). The court in this case said: "Where the proper officers of the government receive services or property under a contract made by one who was not an authorized agent

of the government and they use it for a lawful purpose so that the government derives a legal benefit therefrom, the contractor may recover the actual value of the property sold or service rendered." In another case, that of *Adams v. United States*, 2 Ct. Cl. 70 (1866), it appeared that the Secretary of War was impliedly authorized by Congress to complete certain vessels then building under a contract of doubtful validity and the boats were delivered by the contractor, the Secretary neither objecting to it nor proposing another. The United States was held to be bound and the previous contract adopted and ratified. This case was taken to the Supreme Court and by them reversed, but on other grounds. (7 Wall. 463 [1868].) See also *Tenney v. United States*, 10 Ct. Cl. 269 (1874), where the chief quartermaster ratified a previously unauthorized act of an assistant.

§ 203. Power of Subordinate Officers to Contract

It was said in the case of *Baker v. United States*, 3 Ct. Cl. 343, 350 (1867): "Subordinate officers frequently make contracts . . . subject to the ratification or approval of their superiors, and where they do so, there can be no doubt that the transaction is subject to and dependent upon the stipulation. To make it binding as an express contract, such approval or ratification must be first obtained. But where a public officer, with full power to enter into contracts, makes an absolute agreement, and submits it to his superior officer, in the due course of official duty and routine, I am not aware that the law confers upon the latter any power of rescission or amendment." (See also *Caleb v. United States*, 3 Ct. Cl. 351, 354 [1867].)

The Supreme Court also has passed upon the validity of contracts made by subordinate officers. In a case where ice ordered for the use of the government by the Assistant Surgeon-General was lost because of the suspension of the order

by his superior, the right of the contractor to recover was upheld. The court thus stated the law:

"The office of Surgeon-General is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found, in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence statutes have been made creating the office of assistant secretaries for all the heads of departments.

"It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department. It was to relieve the overburdened principal of some of those duties that the office of assistant was created. In the immense increase of business in the office of Surgeon-General during the war, similar relief was found necessary, and the office of Assistant Surgeon-General was created.

" It was not intended to deny that he was subordinate to the chief of his bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. But until so revoked or disapproved, it was valid, and parties required to act under it had a right to rely on it." (*Parish v. United States*, 100 U. S. 500 [1879]; reversing 12 Ct. Cl. 609 [1876].)

§ 204. Approval as Distinguished from Ratification

The words "approval" and "ratification" are not always used discriminatingly in the cases which have been quoted.

In so far as concerns this subject the word "approval" imports a contract made under proper authority but with a proviso that it shall not be valid and effective unless or until

it has been confirmed or approved by some other officer designated in the instrument. "Ratification" is more properly used in those instances where the contract was entered into without authority in the person of the contracting officer, which lack was later supplied by the approving action of one who could himself have lawfully made the agreement at the time it was made.

CHAPTER XXIV

FORMAL WRITTEN CONTRACTS

§ 205. What Contracts Must be Written

Formal written contracts are those contracts made in compliance with the provisions of Section 3744 of the Revised Statutes. By that statute the Secretaries of War and Navy and the Secretary of the Interior are required to cause every contract made by them on behalf of the government to be reduced to writing, signed by the contracting parties at the end thereof, and filed in the Returns Office of the Department of the Interior. The necessity of having contracts with the government made in writing very early impressed itself on our national legislators, and it is a fact of interest that this act was approved during the Civil War, June 2, 1862. (12 Stat. 311.) Since the entry of the United States into the war with Germany and by direction of the President some of the contracts made in pursuance of this act have not been filed in the Returns Office of the Interior Department for the reason that, as this office is open to public inspection, the filing of such contracts might disclose valuable information to the enemy. Many of these contracts have been so filed, however, and latterly the tendency of the purchasing officers of the government has been to incline more and more to strict compliance with the statutory provisions. Informal or verbal contracts not in excess of \$500 in amount, which are to be performed within 60 days, are, by implication, permitted by authority of certain acts applicable to the several departments of the army. By their terms these acts require contracts in excess of the amount and period specified, to be in writing and signed at the end. (For the form of these see Appendix D.)

§ 206. Emergency Contracts to be Filed

In the matter of contracts entered into prior to the late war, the Supreme Court of the United States has held its provisions mandatory, and the Court of Claims in the case of *Cobb v. United States*, 18 Ct. Cl. 515 (1883), held that this section applied to emergency contracts let under the provisions of Section 3709 of the Revised Statutes, authorizing contracts to be made without advertisement under certain conditions. The action of the Secretary of War, through orders and regulations has, however, validated contracts that would otherwise under these decisions be invalid. As previously noted regarding departments and agencies of the government not covered by the act, the acceptance of a bid is sufficient to bind the government, the acceptance and the various preceding steps being in all other respects regular. (*Garfield v. United States*, 93 U. S. 242 [1876]; *Tenney v. United States*, 10 Ct. Cl. 219 [1873].) It will also be noted that the War Department during the late state of war only advertised for bids in those matters or for those articles which the Military Intelligence Office certified it was not incompatible with the general good to make public; this in substance was also the practice of the Navy Department.

§ 207. Purpose of the Act

"This is one of the several acts which evince the intention of Congress to place the contracting officers of the government under the restraints of law. To avoid disputes with contractors, the contracts are to be put in writing. To avoid ambiguities, mistakes, and omissions of detail, and statutory requirements, they are to be drawn up after carefully prepared legal forms to be furnished by the secretaries (Revised Statutes, 3747), and, when so drawn up, to be signed by the contracting parties with their names at the end thereof. That it may be readily known in what liabilities the numerous con-

tracting officers are involving the government, sworn copies are to be forthwith filed in one common office. . . .

§ 208. Complete Contract Must be Signed

"Congress inserted these words for a purpose, the courts must give them effect. We cannot shave off the language of an act of Congress to bring its meaning within less restricted language, common in statutes of fraud. These additional words cannot mean less than that the contract shall be so full and complete before signing that it can be signed in whole by both parties. It excludes the idea that one party may sign one part of the contract and the other another and have the courts arrange a contract by collecting and joining the pieces. . . .

"If this is the proper construction of the statute, negotiations, correspondence, proposals, and acceptances, although conducted in writing, but signed only in part by one party and in part by the other, do not constitute the required complete contract signed in whole by both parties. At most they are only preliminary memoranda to be used in drawing a contract so complete that it can be 'signed by the contracting parties with their names at the end thereof.'" (South Boston Iron Co. v. United States, 18 Ct. Cl. 165, 177 [1883].)

§ 209. Requirements Contractor Should Remember

Ignorance of the law is no excuse for its non-observance. The statute just referred to as amended by Act of June 15, 1917, 40 Stat. 198, has been set out in full in another place (Appendix D), but, in brief, there are just two of its requirements which a contractor should remember and observe in contracting with either of the three departments named above. He must see to it first, that the contract is in writing, and second, that it is signed by the contracting parties at the end thereof. (See Revised Statutes 3744, 3747, Appendix D.)

Other duties than these are imposed by the act upon officers representing the government in the making of these contracts, but as to these particular points the Supreme Court of the United States has said: "A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act, with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect." (Clark v. United States, 95 U. S. 539, 542 [1877].)

§ 210. Consequence of Failure to Obey Act

A contract not in writing, as required by the statute, is void, and if not performed may not be sued upon. If executed by both parties, the value of supplies or services furnished is to be ascertained by reference to the contract. Thus, if goods are furnished under a void contract and payment agreed upon is received therefor, the contractor cannot, in the event that there has been an increase in the market value of the things sold between the time when the agreement was entered into and delivery was made, bring suit and recover the difference between the amount paid and the value at the time of delivery. (St. Louis Hay & Grain Co. v. United States, 191 U. S. 159 [1903].)

The word "void," as used in the above paragraph, has in a later case been held to mean voidable at the option of the United States—the party for whom protection is desired. (See United States v. N. Y. & Porto Rico S. S. Co., 239 U. S. 88 [1915].)

§ 211. Meaning of "Quantum Meruit"

If, however, after supplying the goods or services payment is refused by the government upon the ground that the contract is void, because in violation of the law, the contract being non-enforceable, the contractor may then maintain a *quantum meruit* or *quantum valebat* upon the theory of an implied contract and recover the actual value of the services rendered or goods delivered, as the case may be. In the absence of any other evidence on the subject, this value may fairly be assumed to be that stipulated in the agreement. (Clark v. United States, 95 U. S. 539 [1877]; St. Louis Hay & Grain Co. v. United States, 191 U. S. 159 [1903]; Lindsley v. United States, 4 Ct. Cl. 359 [1868]; Burchiel v. United States, 4 Ct. Cl. 549 [1868]; Wilson & Goss v. United States, 23 Ct. Cl. 77 [1888]; Moran Bros. Co. v. United States, 39 Ct. Cl. 486 [1904].)

§ 212. Act Applies to Emergency Contracts Not Advertised

It should be noted that unless an exception has been made by some subsequent law, to which the reader is referred (see Act Validating Informal War Contracts in Appendix D), this act applies to those contracts made in an emergency without advertisement; in other words, contracts made during the great war just brought to a close.

§ 213. Object of Act to Guide in Its Interpretation

It must be borne in mind, however, that the purpose of the act was to furnish needed protection to the United States and not to benefit the contractor who does not need such protection in dealing with the government. It has been held, that, notwithstanding such formal contract is not made and signed by the parties, if they did actually make an agreement, the government may waive the informality and hold the contractor to his part of the agreement, said agreement being not

void but merely voidable at the option of the United States, the party whom it is desired to protect. (See *United States v. N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88 [1915]; *Cobb v. United States*, 18 Ct. Cl. 514 [1883].) Nor was the formal execution of contracts for government work, as a prerequisite to their legality and binding effect after the acceptance of proposal, dispensed with by the Acts of Congress of March 3, 1883, 22 Stat. 487, and August 11, 1888, 25 Stat. 423. These two later acts empowered the Secretary of War to regulate and prescribe forms for the letting of contracts, but they did not remove the necessity for writing as required by Section 3744. (*United States v. Lamont*, 2 App. D. C. 532 [1894].)

§ 214. Terms of Written Contract Conclusive

Examination in detail is desirable of situations illustrating the necessity or non-necessity of contracts being in writing. An act of Congress directing the head of a department to enter into a contract with certain parties, provided it can be done on terms previously offered by the parties, does not of itself create a contract. If such parties afterwards sign a written agreement with the secretary on terms less favorable to them than the act of Congress authorized the secretary to make, they must abide by their action in accepting the less favorable terms. (*Gilbert & Secor v. United States*, 8 Wall. 358 [1869].)

§ 215. Preliminary Memoranda Not Contract

The court has held that preliminary memoranda do not constitute a completed contract. In this case it was decided that the acceptance by the Chief of the Bureau of Steam Engineering of the Navy Department, by direction of the Secretary of the Navy, in a letter of March 7, 1877, and at subsequent dates, of an offer to build new boilers for certain

vessels of the Navy, the specifications of the same to be later furnished by the bureau, did not constitute a "contract in writing" within the meaning of Section 3744, Revised Statutes. The court held that the correspondence relied on in this case to show a contract in writing, was merely the preliminary memoranda made by the parties for use in preparing a contract in the form required by law. (*South Boston Iron Co. v. United States*, 118 U. S. 37 [1886].)

The presumption always is that the provisions contained in the formal written contract supersede all previous oral negotiations and preliminary agreements. Oral evidence to prove some supplementary parol agreement is only admissible when it may properly be inferred that the parties did not intend the written agreement to be a complete and final statement regarding the transaction between them.

§ 216. Formal Contract Must Follow Accepted Proposal

Where a bid is invited, made, and accepted, the parties have *agreed upon the terms upon which they are willing to contract*, if a formal, written contract is required by law. Without an appreciation of this fact, it would be difficult to explain an apparent conflict between the opinions just quoted and the decision in the case of *Harvey v. United States*, 105 U. S. 671, 688 (1881). Here the facts having disclosed an essential variation between the accepted proposal and the formal contract subsequently drawn up, the court held that: "The written bid in connection with the advertisement, and the acceptance of that bid constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam work. . . . The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to work and prices contained in the bid. If the formal contract is susceptible of a different construction, to the prejudice of the

contractors, it is very plain that not only the contractors, but the officers of the government, were under a mistake. . . . There is no evidence to show that the parties intended to alter the terms of the bid as to work and prices . . . and . . . the written contract must be reformed accordingly." This is illustrative of another difference between the general law of contracts and the law of government contracts, which will be more apparent from decisions about to be cited.

This case, which is a most important one, has been cited time and time again in litigation before the Court of Claims, but it must not be assumed from a reading of the opinion as quoted above that it was intended to modify in any degree the requirement that as to certain departments, contracts must be in writing and signed by the parties, to give them validity, or to imply that preliminary negotiations will usually control the written contract. (See *McLaughlin & Co. v. United States*, 36 Ct. Cl. 138 [1901]; and *Sanger v. United States*, 40 Ct. Cl. 47 [1904].) In this instance the negotiations were all in writing and formal in character. It is but reasonable to presume, where the parties have in this manner specifically and clearly agreed to the terms of a transaction, that in the absence of any further discussion the formal instrument required by law would embody these terms without material variations. There being no evidence presented to show that the modifications were due to accident or mistake, the court, in the exercise of its power, ordered the reformation of the contract.

§ 217. Common Law Rule vs. Government Contract Law

In another case a proposal and letter of acceptance both fixed a rate of \$1.47½ per cubic foot for building stones containing from 150 to 200 cu. ft., and the former fixed a price of 25 cents extra per cubic foot for all blocks containing more than 200 cu. ft. The formal contract fixed a price of \$1.47½

for all stones exceeding 150 cu. ft. and up to 200 cu. ft., but was silent as to larger blocks. In determining the proper compensation for stones in excess of 200 cu. ft., the court said: "By the common law rule all prior understandings are merged in the final contract. That rule cannot be so strictly applied to government contracts, because they are required to be made by advertisements, bids, and acceptances. If this rule were to be strictly applied to such contracts, the agents of the government, having gone through the formality of advertising, could make important changes without submitting them to the publicity and competition required by law." After quoting from the decision of the Supreme Court in *Harvey v. United States*, which has just been referred to, the court continued: "For the reason above stated, and under this ruling of the Supreme Court, we feel authorized, in order to ascertain the intention of the parties, to examine, in connection with the contract, the advertisement, proposals, and acceptance. From all these papers combined we derive the conclusion that it was the intention of both parties that all stone exceeding 200 cu. ft. should be paid for at the rate of \$1.72½ a cubic foot." (*Mueller v. United States*, 19 Ct. Cl. 581 [1884].)

In another case it appeared that the formal contract was drawn up but the contractor refused to sign it because it failed to embrace all the articles which he understood to have been embraced within the proposals, but was afterwards induced to sign the contract by a letter written by the government official in charge of the work agreeing to some of the contractor's objections. In an action brought by the contractor, the court held that the letter of the Commissary, having been known to the Commissary-General, as was also the contract itself, could be admitted in evidence either as a reformation of the instrument before execution or as agreed construction to be given it. (*Gibbons v. United States*, 5 Ct. Cl. 416 [1869].)

§ 218. Need of Caution by Contractor

Printed forms are provided by the departments for use by their officers in making contracts, but it sometimes happens that these forms fail in some respect to conform to the need of the moment or it may be that in an emergency the blanks are not available, and then the contractor must be particularly on his guard. Lacking in experience and a knowledge of the law, though abounding in enthusiasm, some of the recent additions to the contracting force of the War and Navy Departments are not always careful to see that their contracts, made in behalf of the government, are put in legal form. At a critical point of a great war rules and regulations effective in times of peace are quite properly relaxed where the good of the service requires it. At such a time, therefore, when orders for war material, placed without formal contract, reach the attention of the law officers of the procurement or other proper divisions of these departments, it may well be that there is a tendency on their part to overlook the violation of the law where the material is needed and the price fair, and close the incident by having the proper contract drawn up and signed. But the contractor cannot afford to take a chance of this kind, and the officer is no doubt sufficiently warned by the first occurrence. The government overlooks these infractions of the law only when it profits thereby.

§ 219. Summary

In summing up this point, it may be said that: (1) as to contracts not required to be in writing, an advertisement inviting bids, followed by a proposal which is accepted constitutes a valid, enforceable contract, binding on both parties; (2) with those departments with which formal written contracts are demanded by the law, these same steps would be considered preliminaries stating the terms upon which the parties agree to contract, but conferring no right of action to

compel performance in accordance therewith. Nor would the refusal of the bidder to proceed further and sign the formal agreement subject him to any penalty unless there be some statute or regulation, applicable to the particular department, expressly so providing.

CHAPTER XXV

PROCEDURE TO SECURE PAYMENT

§ 220. **Analogy**

The plan of checks and balances by which the government under the Constitution has been divided into three departments—executive, legislative, judicial—has its analogy in the plan of checks and balances in the payment and settlement of government contracts. Who the disbursing officers are in the first instance, can be discovered by reference to Appendix C; here the practice and procedure in matters of dispute may be considered.

§ 221. **Auditors**

Within the executive branch of the government, the accounts of the various officers are reviewed by auditors, known respectively as auditors for the War, the Navy, Treasury, Interior, and Post Office Departments, and the auditor of all other departments, boards, commissions, and establishments of the government, known as the "Auditor for the State and Other Departments." The function of these auditors, whose offices, establishments, and records are in Washington, is to review the accounts of those officers of the government who are charged with disbursements, not only for government contracts, but for salaries and all matters of any kind whatsoever.

§ 222. **Appeals Within Executive Departments**

Should a disbursing officer refuse payment of a bill under a contract, express or implied, it should then be taken up and presented to the auditor in charge of the proper department

or bureau. If the claim is presented by anybody other than the claimant in person, as by an agent or attorney, it must be accompanied by a power of attorney to represent the claimant, and, moreover, the attorney must have been admitted to practice in the government departments for this purpose by the Treasury Department. If, upon a presentation of the matter, the auditor refuses to authorize and direct payment, or where a payment has been disallowed, an appeal can then be taken to the Comptroller of the Treasury, whose office is in the Treasury Building at Washington, D. C. His decision is final, so far as the executive branch of the government is concerned, in the disbursing of money for government contracts. It is well at this point to remember that such appeals must be filed within one year from the date of the auditor's settlement (21 Comp. Dec. 25 [1914]), and this limitation applies even though the claimant had received no notice of such settlement. (9 Comp. Dec. 597 [1903].)

Other matters in connection with appeal to be borne in mind while the claim is still within the hands of the auditor but an appeal is already in prospect are:

1. No appeal will be allowed if the amount disallowed by the auditor has been refunded and the account closed.
2. The Comptroller will generally accept statements of government officers—as shown by the record in the auditor's office—as correct relative to disputed matters of fact. (14 Comp. Dec. 452 [1908]; 18 Comp. Dec. 648 [1912].)
3. The Comptroller has no authority to settle purely equitable claims (9 Comp. Dec. 663 [1903]; nor to entertain appeals by sureties. (15 Comp. Dec. 754 [1909].)

From the foregoing it will be apparent that the Comp-

troller has no authority to take testimony and decide disputed matters of fact (19 Comp. Dec. 408 [1913]) and it might be added, to review decisions of a predecessor on points of law. (16 Comp. Dec. 336 [1909].) A careful reading of the decisions bearing on the foregoing will show how necessary it is for the claimant in presenting his claim to the auditor to see that the record contains all the material facts necessary to substantiate his claim, so that upon appeal to the Comptroller it is substantially a question of law to be decided.

It might well be further stated that while the Comptroller has to decide many questions of law in the course of the year, yet government officials may, in certain instances, request advance decisions when such requests are accompanied by pertinent facts and do not relate to the payment already made. (10 Comp. Dec. 812 [1904]; 4 Comp. Dec. 113 [1897]; 14 Comp. Dec. 6 [1907]; 18 Comp. Dec. 467, 512 [1911] [1912].)

§ 223. Suits in the Court of Claims

Should the decision of the Comptroller of the Treasury in any matter of contract be adverse to the contractor, the latter has the remedy of a suit in the Court of Claims. This court consists of a chief justice and four associate justices, sitting in the city of Washington and having jurisdiction upon any contract, express or implied, with the government of the United States. Its jurisdiction extends also to suits for damages, liquidated or unliquidated, in any case not sounding in tort, containing elements constituting a civil wrong independent of contract, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. The Court of Claims has also the right to determine controverted questions of fact or law which may be referred to them by the heads of the executive departments. If when

such a request for a finding has been transmitted, it appears that it has been done with the consent of the claimant or it shall appear from the facts established that the court has jurisdiction to render a judgment, then it is required so to act. The court has further jurisdiction upon the certificate of any auditor or of the Comptroller of the Treasury and upon the direction of the Secretary of the Treasury to hear and determine any claim on which the claimant could have himself commenced suit in the Court of Claims. (See Section 149 Judicial Code of the United States [Appendix D].)

§ 224. Appeals Under Commandeering Provisions

As previously noted, the several commandeering provisions in the war legislation authorize claimants to bring suit in the several district courts of the United States or in the Court of Claims. While the jurisdiction in the district court is limited to \$10,000, there is no limit on the jurisdiction in the Court of Claims. While appeals are allowed in certain instances to go direct from district courts to the Supreme Court of the United States, yet the appeal allowable from the decision of the Court of Claims under Section 242 of the Judicial Code is much broader than that created by Section 238 of the same code for the district courts.

The Court of Claims has authority to direct the taking of testimony by commissioners and has also the right, upon motion of the government, to compel the claimant to submit to examination.

§ 225. Weight of Decisions

In the consideration of the weight to be accorded decisions of the various tribunals, judicial and quasi-judicial, mentioned in this work, it must not be forgotten that on all points of law decided by the Supreme Court of the United States their decisions are binding upon all court and tribunals of

lesser jurisdiction. Therefore every effort should in the first instance be made to determine whether or not the Supreme Court has decided a given point of law. If it has not, recourse may then be had to the decisions of the district courts and courts of appeals of the United States, to the Court of Claims, and then to the opinions of the Attorney-General and the Comptroller of the Treasury. Unfortunately there are on record more instances than one of an Attorney-General reversing his predecessor's decisions, as has been noted, but the Comptroller of the Treasury has decided in 16 Comp. Dec. 336 (1909), that *he* has no power to review the decisions of a predecessor on points of law, his rights and duties in this regard having been drawn from the Act of July 31, 1894.

APPENDIX

APPENDIX A

PRACTICAL SUGGESTIONS

So many commissions and bureaus have grown up in recent years independent of the jurisdiction of the executive departments of the government, including government-owned corporations, that to lay down a general rule in the matters of purchase and payment applicable to all would be impossible. It has therefore been thought wise to include a list of the officials who have charge of the purchasing and who make the payments in the matter of government contracts and purchases. It may be said, however, that the act of Congress creating the General Supply Committee, creates, in a way, a rule of purchase for certain supplies for the executive departments, while the creation of the position of Director of Purchases, Traffic and Storage in the War Department has tended to create a system of purchases in that department.

In the War Department a card-indexed list of bidders, approximating fifty thousand names, has been built up. The list contains information for the use of the government showing how well or how inefficiently bidders on this list, when awarded contracts, have carried out their agreements. Most of the government officers having to do with purchases in other departments have similar lists. It is the custom for business firms desiring to bid on such contracts as are made by a given department, to request that their names be placed on the proper lists for the purpose of being notified when proposals are invited.

When proposals go out they not only go to the man who expects to bid, that is to the contractor who will bid on the whole, but also to the man who bids on separate items, and,

in some instances, to the material men or subcontractors of a contractor. The writer has frequently passed on contracts when the percentage of the total amount of the contract furnished by the subcontractor or material man exceeded one-half or three-fourths of the whole. It becomes necessary, therefore, for the subcontractor to have accurate knowledge of what the contractor proposes to undertake.

In collaboration with the head of the credit department of one of the large industries of the country the writer prepared, during the past war, a blank containing a series of eighteen questions. The answers to these questions should furnish valuable information to the subcontractor or material man and constitute a basis, not only for extending or withholding credit, but also for keeping tab on the contract and for making collections from the contractor. As this blank was drawn up during the crisis of the war with Germany, Questions 9 and 10 are of little practical application at this moment, but they are included by way of reference. Regarding the questions themselves very little explanation is needed other than that (c) and (d) of Question 17 were framed to cover the so-called imprest accounts of the United States Shipping Board, Emergency Fleet Corporation.

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Please answer the following inquiries:

1. Are you a manufacturer, general contractor, or subcontractor?
2. Is your contract with the United States Government, or with a general contractor?
3. If with the government, is it with the government directly or with a contractor acting as the government's agent?
4. If with a general contractor, is the general contractor financing his own requirements?
5. What department, bureau, or commission of the government placed the contract?

6. If bureau, give name of department of which bureau is part.
7. What is the name and title of the government officer who signed the contract?
8. What is the contract number?
9. Has the contractor been granted governmental aid in financing, either through the War Finance Corporation or under the Urgency Deficiency Bill of October 6, 1917, commonly called the Advance Payments Act, or in any other way?
10. If so, to what amount and under what terms and conditions?
11. What are name and title of government officer in charge of work and where is he stationed?
12. What work and material are called for by the contract?
13. What are its terms and conditions as to deliveries of materials and completion of work?
14. What are its limitations as to time?
15. What are its penalties, if any?
16. What are its stipulations, if any, as to right of cancellation?
17. What are the terms of payment?
 - (a) What are the stipulations as to approvals for inspection, acceptance, and payment?
 - (b) Has it any provision as to payment in advance of delivery dates, or as the work progresses before its completion? If so, give details.
 - (c) Have any funds been appropriated and placed on deposit? If so, where?
 - (d) Under whose control have such funds been placed?
18. Does the contract require the furnishing of a bond? If so, please answer the following questions:
 - (a) Character of bond?
 - (b) Amount?
 - (c) Name of surety or sureties?
 - (d) To whom does the bond run?

(Name).....

(Address).....

.....

Date.....

APPENDIX B

GOVERNMENTAL PURCHASING OFFICERS AND AGENCIES

AGRICULTURE, DEPARTMENT OF

Board of Award, Agriculture Grounds, Washington, D. C.
Forestry Service, 928 F Street, N. W., Washington, D. C.
Weather Bureau, 24th & M Sts., N. W., Washington, D. C.

COMMERCE, DEPARTMENT OF

Bureau of Fisheries, Fisheries Bldg., 7th & B Sts., S. W., Washington, D. C.
Bureau of Lighthouses, Headquarters, Department of Commerce Bldg., Washington, D. C.
Bureau of Standards, Room 300, South Bldg., Connecticut Ave. and Pierce Mill Road, Washington, D. C.
Chief Clerk, Department of Commerce, Washington, D. C.
Division of Supplies, Department of Commerce, Washington, D. C.

GENERAL SUPPLY COMMITTEE

14th & B Sts., S. W., Washington, D. C. (This committee makes purchases for all executive departments but not for the field services thereof.)

INLAND WATERWAYS COMMISSION

Secretary, 6th & G Sts., N. W., Washington, D. C.

INTERIOR, DEPARTMENT OF

Alaskan Engineering Commission, Headquarters Interior Bldg., Washington, D. C.
Chief Clerk, Department of Interior, United States Patent Office Bldg., Washington, D. C.
Commissioner of Indian Affairs, Interior Bldg., Washington, D. C.
Commissioner of Patents, Patent Office, 7th & G Sts., N. W., Washington, D. C. (Reproduction of the *Patent Office Gazette*.)

General Land Office, Office of the Commissioner, Interior Bldg., Washington, D. C. (This office purchases maps and survey posts.)

Purchasing Agent, Alaskan Engineering Commission, Seattle, Wash.

Secretary's Office, 18th & F Sts., N. W., Washington, D. C.

JUSTICE, DEPARTMENT OF

Superintendent of Prisons, Vermont Ave. & K St., N. W., Washington, D. C.

LABOR, DEPARTMENT OF

Bureau of Industrial Housing and Transportation, 613 G St., N. W., Washington, D. C.

Chief Clerk, Department of Labor, Washington, D. C.

NAVY DEPARTMENT

Bureau of Medicine and Surgery, Navy Department, Washington, D. C.

Bureau of Ordnance, Navy Department, Washington, D. C.

Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

Bureau of Yards and Docks, Navy Department, Washington, D. C.

United States Marine Corps—Major-General Commandant of Marine Corps, Navy Department Annex, Washington, D. C.

United States Coast Guard, Bond Bldg., Washington, D. C.

PANAMA CANAL COMMISSION

Assistant Purchasing Agent, 24 State St., New York City.

Assistant Purchasing Agent, New Orleans, La.

General Purchasing Agent, 1703 G St., N. W., Washington, D. C.

POST OFFICE DEPARTMENT

Aerial Mail Service, Room 506, Post Office, Washington, D. C.

Fourth Assistant Postmaster-General, Post Office Bldg., Washington, D. C.

Purchasing Agent, Room 606, Post Office Department, Washington, D. C.

PUBLIC PRINTING

Deputy Public Printer, Government Printing Office, Washington, D. C.

Joint Committee on Printing. (Three members are senators and three members are representatives. This committee fixes upon standards of quality, receives proposals and awards contracts therefor, and appoints a member of the board of paper inspection to determine differences of opinion as to quality. It acts upon defaults, and authorizes open-market purchases.)

Public Printer, Government Printing Office, Washington, D. C.
Purchasing Agent, Government Printing Office, North Capitol & G Sts., N. W., Washington, D. C.

RAILROAD ADMINISTRATION, UNITED STATES

Central Advisory Committee, 704 Southern Bldg., Washington, D. C. Makes purchases of all cars, locomotives, rails, and tug boats. All other purchases are made by the railroads, such purchases being subject to review by regional advisory committees located at the following points:

Atlanta, Ga., Healy Bldg.

Chicago, Ill., Transportation Bldg.

New York City, Grand Central Terminal.

Philadelphia, Pa., Broad Street Station.

Roanoke, Va.

St. Louis, Mo., Railway Exchange Bldg.

TREASURY DEPARTMENT, UNITED STATES

Bureau of Engraving and Printing—Purchasing Clerk, 14th and C Sts., S. W., Washington, D. C.

Liberty Loan Publicity, Treasury Bldg., Washington, D. C.

Supervising Architect, Treasury Bldg., Washington, D. C.

UNITED STATES EMERGENCY FLEET CORPORATION

Washington, D. C.

UNITED STATES SHIPPING BOARD

District Purchasing Offices:

Baltimore, Md., 615 Lexington Bldg.

Boston, Mass., Custom House.

Cleveland, Ohio, Perry-Payne Bldg.

Jacksonville, Fla., Herald Bldg.

New Orleans, La., 430 Audubon Bldg.

New York City, 115 Broadway.

San Francisco, Cal., 343 Sansom St.

Seattle, Wash., Securities Bldg.

General Purchasing Office, 140 North Broad St., Philadelphia, Pa.

WAR DEPARTMENT

Purchasing Department Heads:

Bureau of Aircraft Production, Building "D," 4½ St. & Missouri Ave., N. W., Washington, D. C.

Clothing and Equipment Division, Munition Bldg., Washington, D. C.

Construction Division, Building "C," 7th & B Sts., N. W., Washington, D. C.

Department Quartermasters:

Central Dept., Chicago, Ill.

Eastern Dept., Governors Island, N. Y. Harbor, N. Y.

Northeastern Dept., Boston, Mass.

Southeastern Dept., Charleston, S. C.

Southern Dept., San Antonio, Tex.

Western Dept., San Francisco, Cal.

APPENDIX C

GOVERNMENTAL DISBURSING OFFICERS AND AGENCIES

AGRICULTURE, DEPARTMENT OF

Chief Clerk, Department of Agriculture, Washington, D. C.
Division of Accounts and Disbursements, Department of Agriculture, Washington, D. C.

COMMERCE, DEPARTMENT OF

Chief Clerk, Department of Commerce, Washington, D. C.
Disbursing Clerk, Department of Commerce, Washington, D. C.
Division of Publications, Department of Commerce, Washington, D. C. (Expenditures for the publishing work.)
Division of Supplies, Department of Commerce, Washington, D. C.

COUNCIL OF NATIONAL DEFENSE

Washington, D. C.

GENERAL SUPPLY COMMITTEE

Washington, D. C.

INTERIOR, DEPARTMENT OF

Auditor, Department of Interior, Washington, D. C.
Chief Clerk, Department of Interior, Washington, D. C.
Secretary, Department of Interior, Washington, D. C. (Certain institutions, such as hospitals, etc.)

INTERSTATE COMMERCE COMMISSION

Secretary, Interstate Commerce Commission, Washington, D. C.

JUSTICE, DEPARTMENT OF

Chief Clerk, Department of Justice, Washington, D. C.
Chief of the Division of Accounts, Department of Justice, Washington, D. C. (Has charge of the examination or audit of all accounts payable from appropriations for expenses of the Department of Justice and the Courts of the United States.)
Disbursing Clerk, Department of Justice, Washington, D. C.

Librarian, Department of Justice, Washington, D. C. (For books.)

LABOR, DEPARTMENT OF

Bureau of Immigration, Department of Labor, Washington, D. C.

Chief Clerk, Department of Labor, Washington, D. C. (All expenditures from the appropriations for contingent expenses and rents.)

Chief of the Division of Publications & Supplies, Department of Labor, Washington, D. C.

NAVY DEPARTMENT

Auditor, Navy Department, Washington, D. C.

Bureau of Steam Engineering, Navy Department, Washington, D. C. (Payment of expenses of operation of radio stations on shore.)

Coast Guard, Division of Material, Navy Department Annex, Washington, D. C.

Paymaster-General, United States Marine Corps, Navy Department, Washington, D. C.

Secretary of Navy, Navy Department, Washington, D. C.

POST OFFICE DEPARTMENT

Auditor, Post Office Department, Washington, D. C.

Chief Clerk, Post Office Department, Washington, D. C.

Third Assistant Postmaster-General, Washington, D. C.

Fourth Assistant Postmaster-General, Washington, D. C.

PUBLIC PRINTING

Accountant, Government Printing Office, Washington, D. C.

Deputy Public Printer, Government Printing Office, Washington, D. C.

Public Printer, Government Printing Office, Washington, D. C.

RAILROAD ADMINISTRATION, UNITED STATES

Director-General, United States Railroad Administration, Washington, D. C.

STATE, DEPARTMENT OF

Auditor for the State and other departments, "and all boards, commissions, and establishments of the government not under the administration of any executive department," Washington, D. C.

Bureau of Accounts, Department of State, Washington, D. C.

TREASURY, DEPARTMENT OF

Auditor, Treasury Department, Washington, D. C.

Chief Clerk, United States Treasury, Washington, D. C.

Commissioner of Internal Revenue, Treasury Bldg., Washington, D. C.

Comptroller of the Treasury, Washington, D. C. (Renders final ruling on appeal in disputed accounts.)

Director, United States Mint

Secretary, Treasury Department, Washington, D. C.

UNITED STATES EMERGENCY FLEET CORPORATION

Comptroller or Auditor of U. S. Treasury, Emergency Fleet Corporation, Washington, D. C.

UNITED STATES SHIPPING BOARD

Comptroller, United States Shipping Board, Washington, D. C.

WAR CREDITS BOARD

Washington, D. C.

WAR DEPARTMENT

Auditor, War Department, Washington, D. C.

Assistant and Chief Clerk, War Department, Washington, D. C.

Assistant Secretary of War, Washington, D. C. (Open-market purchases.)

Quartermaster General, United States Army, Washington, D. C.

Second Assistant Secretary of War, Washington, D. C.

Secretary of War, Washington, D. C.

Superintendent, War, State & Navy Bldg., Washington, D. C.

Surgeon General, United States Army, Washington, D. C.

APPENDIX D

STATUTES RELATING TO CONTRACTS WITH THE UNITED STATES

STATUTES OF GENERAL APPLICATION

R. S. Sec. 3709—Advertisements for Proposals and Bids

All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

[This section was amended by Act of January 27, 1894, 28 Stat. 33, and the amendment was limited in its application by Act April 21, 1894, 28 Stat. 62. The amendment so limited was superseded by Act June 17, 1910, 36 Stat. 531, which immediately follows this note.]

Act June 17, 1910, 36 Stat. 531—Supplies for Executive Departments; Contracts for, How Made; General Supply Committee Created; Bonds of Contractors; etc.

Sec. 4. That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render

whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further*, That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him.

R. S. Sec. 3828—No Advertisement Without Authority

No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department; and no bill for any such advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority.

[It should be noted that the requirement as to advertising has been modified in respect to purchases of limited amount. These acts authorizing open-market purchases by the different departments will be found on the pages indicated: Agriculture, 235; Commerce (Bureau of Lighthouses), 235; District of Columbia, 237; Interior (Indian Service), 239; Navy, 244; War, 266.]

R. S. Sec. 3710—Opening Bids

Whenever proposals for supplies have been solicited, the parties responding to such solicitation shall be duly notified of the time and place

of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made.

R. S. Sec. 5418—Forging: Bid; etc.

Every person who falsely makes, alters, forges, or counterfeits any bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, or utters or publishes as true any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for such purpose, knowing the same to be false, forged, altered, or counterfeited, or transmits to or presents at the office of any officer of the United States any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for such purpose, shall be imprisoned at hard labor for a period not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment.

R. S. Sec. 3679—Expenditures Beyond Appropriations Forbidden; Voluntary Service or Employment of Personal Service in Excess of that Authorized, Forbidden; Appropriations to be Apportioned; Penalty [As Amended Act March 3, 1905, 33 Stat. 1257; Act February 27, 1906, 34 Stat. 48]

No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to

the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.

Act March 4, 1909, 35 Stat. 1106—Penalty for Contracting Beyond Specific Appropriation

Sec. 98. Whoever, being an officer of the United States, shall knowingly contract for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than two thousand dollars and imprisoned not more than two years.

Act July 1, 1902, 32 Stat. 560—Appropriation Must be Specifically Declared

Hereafter no Act of Congress shall be construed to make an appropriation out of the Treasury of the United States unless such Act shall, in specific terms, declare an appropriation to be made for the purpose or purposes specified in the Act.

Act June 30, 1906, 34 Stat. 764—Authority to Contract Must be Given in Specific Terms; Appropriations

No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed.

R. S. Sec. 3648—Advances of Public Moneys Prohibited

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such

advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

R. S. Sec. 3732—Unauthorized Contracts Prohibited

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

Act June 12, 1906, 34 Stat. 255—Same Subject

. . . . That no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year:

Act May 1, 1884, 23 Stat. 17—No Voluntary Service for Government to be Accepted; Employment of Service in Excess of that Authorized, Forbidden

. . . . Hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property.

R. S. Sec. 3735—Contracts Limited to One Year

It shall not be lawful for any of the Executive Departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made.

R. S. Sec. 3736—Restriction on Purchases of Land

No land shall be purchased on account of the United States, except under a law authorizing such purchase.

R. S. Sec. 3737—No Transfer of Contract

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

R. S. Sec. 3731—Name of Contractor to Appear on Supplies

Every person who shall furnish supplies of any kind to the Army or Navy shall be required to mark and distinguish the same with the name of the contractor furnishing such supplies, in such manner as the Secretary of War and the Secretary of the Navy may, respectively, direct; and no supplies of any kind shall be received, unless so marked and distinguished.

R. S. Sec. 3477—Assignments of Claims, Void; Exception

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

R. S. Sec. 3741—Stipulation that No Member of Congress Has an Interest [As Amended by Act February 27, 1877, 19 Stat. 249]

In every such contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no member of or delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.

R. S. Sec. 3743—Deposit of Contracts [As Amended by Acts February 27, 1877, 19 Stat. 249; and July 31, 1894, 28 Stat. 210]

All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the Auditors of the Treasury, according to the nature of the contracts: *Provided*, That this section shall not apply to the existing laws in regard to the contingent funds of Congress.

R. S. Sec. 3744—Contracts to be in Writing [As Amended by Act June 15, 1917, 40 Stat. 198]

It shall be the duty of the Secretary of War, of the Secretary of the

Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

Provided, That the Secretary of War or the Secretary of the Navy may extend the time for filing such contracts in the Returns Office of the Department of the Interior to ninety days whenever in their opinion it would be to the interest of the United States to follow such a course.

R. S. Sec. 3745—Oath to Contract

It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: "I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with _____; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said _____, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided."

R. S. Sec. 3746—Penalty for Omitting Returns

Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

R. S. Sec. 3747—Instructions

It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the

Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.

**Act March 4, 1909, 35 Stat. 1108, 1109 (United States Penal Code)—
Member of Congress Taking Consideration for Procuring Contract, etc.; Offering Member of Congress Consideration to Procure Contract, etc.; Punishment For; Contracts Voidable**

Sec. 112. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void.

Receiving Pay by Senator or Member of Congress in Matters Affecting United States; Punishment For

Sec. 113. Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall moreover, thereafter be

incapable of holding any office of honor, trust, or profit under the Government of the United States.

Member of Congress Interested in Public Contracts; Punishment For; Contracts Void; Repayment, etc.

Sec. 114. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, made or entered into in behalf of the United States by any officer or person authorized to make contracts on its behalf, shall be fined not more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when demanded by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, suit shall at once be brought against the persons so failing or refusing and his sureties, for the recovery of the money so advanced.

Making Official Contract with Member of Congress; Punishment For

Sec. 115. Whoever, being an officer of the United States, shall on behalf of the United States, directly or indirectly make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such Member, Delegate, or Resident Commissioner, and either before or after he has qualified, and during his continuance in office, shall be fined not more than three thousand dollars.

Contracts Not Affected

Sec. 116. Nothing contained in the two preceding sections shall extend, or be construed to extend, to any contract or agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement.

Official Accepting Bribe; Punishment For

Sec. 117. Whoever, being an officer of the United States, or a person

acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof; or whoever, being an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.

[The eight-hour work-day was established by Act of August 1, 1892, 27 Stat. 340. This law was before the Supreme Court in the case of *Ellis v. United States*, 206 U. S. 246 (1907). Its constitutionality was there upheld; but following the construction there given it as applied to certain laborers, the Acts of June 19, 1912, and March 3, 1913, were passed by Congress. In the case of *United States v. Garbish*, 222 U. S. 257 (1911), the words "extraordinary emergency" as used in these acts were interpreted by the court. The law now in force is here set out.]

Act June 19, 1912, 37 Stat. 137—Eight-Hour Work-Day

An act limiting the hours of daily service of laborers and mechanics employed upon work done for the United States, or for any Territory, or for the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such con-

tract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this Act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the Commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court.

Sec. 2. That nothing in this Act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this Act. The President, by Executive order, may waive the provisions and stipulations in this Act as to any specific contract or contracts during time of war or a time when war is imminent, and until January first, nineteen hundred and fifteen, as to any contract or contracts entered into in connection with the construction of the Isthmian Canal. No penalties shall be imposed for

any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this Act shall be construed to repeal or modify the Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia" being chapter three hundred and fifty-two of the laws of the Fifty-second Congress, approved August first, eighteen hundred and ninety-two, as modified by the Acts of Congress approved February twenty-seventh, nineteen hundred and six, and June thirtieth, nineteen hundred and six, or apply to contracts which have been or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act.

Sec. 3. That this Act shall become effective and be in force on and after January first, nineteen hundred and thirteen.

Approved, June 19, 1912.

Act March 3, 1913, 37 Stat. 726—Eight-Hour Work-Day

An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon a public work of the United States and of the District of Columbia, and of all persons employed in constructing, maintaining, or improving a river or harbor of the United States and of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections one, two, and three of an Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia" be amended to read as follows:

"Section 1. That the service and employment of all laborers and mechanics who are now, or may hereafter, be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or sub-

contractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this Act shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States.

Violation of Act by Officer or Contractor Punishable

"Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

Existing Contracts Not Affected by Act

"Sec. 3. That the provisions of this Act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon a public work of the United States or of the District of Columbia, or persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, for which contracts have been entered into prior to the passing of this Act or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act."

Sec. 4. That this Act shall become effective and be in force on and after March first, nineteen hundred and thirteen.

Approved, March 3, 1913.

SUITS AGAINST THE UNITED STATES

Act March 3, 1887 [As Amended 1898]

An Act to Provide for the Bringing of Suits against the Government of the United States. (24 Stat. 505.)

Jurisdiction

That the Court of Claims shall have jurisdiction to hear and determine the following matters:

Claims Founded on Constitution or Laws of United States, or Upon Contract in Cases Not Sounding in Tort; Exceptions

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Set-offs and Counterclaims of United States; Limitations; Suits by Officers for Fees

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this Act unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided further,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this Act unless an account for said fees shall have been rendered and finally acted upon according to the provisions of the Act of July thirty-first, eighteen hundred and ninety-four (chapter one

hundred and seventy-four, Twenty-eighth Statutes at Large, page one hundred and sixty-two), unless the proper accounting officer of the Treasury fails to finally act thereon within six months after the account is received in said office.

The Act entitled "An Act to provide additional protection for the owners of patents of the United States, and for other purposes," approved June twenty-fifth, nineteen hundred and ten, shall be, and the same is hereby, amended to read as follows, namely:

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however,* That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further,* That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further,* That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."

Judicial Code of the United States

Sec. 24. The district courts shall have original jurisdiction as follows:

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims juris-

diction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further*, That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Sec. 149. All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.

AGRICULTURE, DEPARTMENT OF

Act March 1, 1899, 30 Stat. 957—Purchases, etc., Without Advertisement

That hereafter section thirty-seven hundred and nine of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered in the Department of Agriculture when the aggregate amount involved does not exceed the sum of fifty dollars.

Act June 30, 1914, 38 Stat. 429—Purchase of Seeds, etc., Without Advertisement

. . . *Provided*, That hereafter the Secretary of Agriculture may procure such seed, cones, and nursery stock by open purchase, without advertisements for proposals, whenever in his discretion such method is most economical and in the public interest and when the cost thereof will not exceed \$500.

COMMERCE, DEPARTMENT OF**BUREAU OF LIGHT-HOUSES**

R. S. Sec. 4665—Contracts Must be Founded on Official Plans and on a Vote of the Board

The Light-House Board shall cause to be prepared by the engineer secretary of the board, or by such officer of engineers of the Army as may be detailed for that service, all plans, drawings, specifications, and estimates of cost, of all illuminating and other apparatus, and of construction and repair of towers, buildings, &c., connected with the Light-House Establishment, and no bid or contract shall be accepted or entered into, except upon the decision of the board, at a regular or special meeting, and through their properly authorized officers.

R. S. Sec. 4666—Regulation of Contracts for Materials, etc.

All materials for the construction and repair of light-houses, light-vessels, beacons, buoys, and so forth, shall be procured by public contracts, under such regulations as the board may from time to time adopt, subject to the approval of the Secretary of the Treasury, and all works of construction, renovation, and repair shall be made by the orders of the board, under the immediate superintendence of their engineer secretary, or of such engineer of the Army as may be detailed for that service.

Act June 17, 1910, 36 Stat. 538—Contracts for Materials; How Made

Sec. 8. That all materials for construction, maintenance, repair, and operation shall be procured by public contracts, under such regulations as

may from time to time be prescribed by the commissioner, subject to the approval of the Secretary of Commerce and Labor, and no contract shall be made except after public advertisement for proposals in such form and manner as to secure general notice thereof, and the same shall only be made with the lowest and best bidder therefor, upon security deemed sufficient in the judgment of the commissioner of light-houses, but all bids may at any time be rejected by the commissioner: *Provided, however,* That the commissioner of light-houses may purchase illuminating oil, wicks, and chimneys for lights, and ground tackle for light-vessels and buoys, and to an amount not exceeding five hundred dollars at any one time, other materials and supplies when immediate delivery is required by an exigency, by private contract or in the open market, if he deems it for the best interests of the service so to do; but such purchases shall be set forth in the annual report of the commissioner with the reasons for purchasing other than upon bids after public advertisement.

Act March 4, 1909, 35 Stat. 973—Proposals for Repair of Vessels; Competition Required

. . . That hereafter any and all proposals for bids for any new machinery or other new equipment necessary in the repair of any vessel in the light-house service shall be on specifications prepared and submitted that will secure competition in the bids for furnishing such machinery or equipment.

Act July 7, 1884—Contracts Required

That hereafter it shall be the duty of the Light-House Board to apply the money appropriated, other than for surveys, as far as can be without detriment to the interests of the Government, by contract.

R. S. Sec. 4680—Officers, etc., Not to be Interested in Contracts

No member of the Light-House Board, inspector, light-keeper, or other person in any manner connected with the light-house service, shall be interested, either directly or indirectly, in any contract for labor, materials, or supplies for the light-house service, or in any patent, plan, or mode of construction or illumination, or in any article of supply for the light-house service.

DISTRICT OF COLUMBIA, PURCHASES IN AND FOR

R. S. Sec. 3711—Inspection of Fuel in District of Columbia [As Amended by Act of March 2, 1895, 28 Stat. 808; and Act of March 15, 1898, 30 Stat. 316]

It shall not be lawful for any officer or person in the civil, military, or naval service of the United States in the District of Columbia to pur-

chase anthracite or bituminous coal or wood for the public service except on condition that the same shall, before delivery, be inspected and weighed or measured by some competent person, to be appointed by the head of the Department or chief of the branch of the service for which the purchase is made from among the persons authorized to be employed in such Department or branch of the service. The person appointed under this section shall ascertain that each ton of coal weighed by him shall consist of two thousand two hundred and forty pounds, and that each cord of wood to be so measured shall be of the standard measure of one hundred and twenty-eight cubic feet. Each load or parcel of wood or coal weighed and measured by him shall be accompanied by his certificate of the number of tons or pounds of coal and the number of cords or parts of cords of wood in each load or parcel.

R. S. Sec. 3712—Appointments to be Notified to Accounting Officer

The proper accounting officer of the Treasury shall be furnished with a copy of the appointment of each inspector, weigher, and measurer appointed under the preceding section.

R. S. Sec. 3713—No Payment Without Certificate

It shall not be lawful for any accounting officer to pass or allow to the credit of any disbursing officer in the District of Columbia any money paid by him for purchase of anthracite or bituminous coal or for wood, unless the voucher therefor is accompanied by a certificate of the proper inspector, weigher, and measurer that the quantity paid for has been determined by such officer.

Act March 2, 1911, 36 Stat. 975—Purchases, etc., for the District of Columbia

Hereafter section thirty-seven hundred and nine of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the District of Columbia when the aggregate amount involved does not exceed the sum of twenty-five dollars.

R. S. Sec. 3826—Advertisements in Washington, D. C.

All advertisements, notices, and proposals for contracts for all the Executive Departments of the Government, and the laws passed by Congress and executive proclamations and treaties to be published in the District of Columbia, Maryland, and Virginia, shall hereafter be advertised by publication in the three daily papers published in the District of Columbia having the largest circulation, one of which shall be selected by the Clerk of the House of Representatives, and in no others. The charges for such publication shall not be higher than such as are paid by individuals for advertising in said papers, and the same publications shall be

made in each of the said papers equally as to frequency: *Provided*, That no advertisement to any State, district, or Territory, other than the District of Columbia, Maryland, or Virginia, shall be published in the papers designated, unless at the direction first made of the proper head of a Department: *And provided further*, That this section shall not be construed to allow a greater compensation for the publication of the laws passed by Congress and executive proclamations and treaties in the papers of the District of Columbia than is provided by law for such publications in other papers. [See next act for partial repeal.]

Act March 3, 1875, 18 Stat. 342—Authority to Advertise in Newspapers Revoked

. . . . and so much of section three thousand eight hundred and twenty-six of the Revised Statutes of the United States as refers to the publication of advertisements in newspapers, be, and the same is hereby, repealed.

Act July 31, 1876, 19 Stat. 105—Advertisements for Contracts in District of Columbia; Newspapers; Restrictions

. . . . and in no case of advertisement for contracts for the public service shall the same be published in any newspaper published and printed in the District of Columbia unless the supplies or labor covered by such advertisement are to be furnished or performed in said District of Columbia. . . .

Act June 20, 1878, 20 Stat. 216—Rate of Payment for Advertisements, Proposals, etc.

That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise: . . . but the heads of the several departments may secure lower terms at special rates whenever the public interest requires it. . . .

Act January 21, 1881, 21 Stat. 317—Advertising in District of Columbia; Rate of Payment

That all advertising required by existing laws to be done in the District of Columbia by any of the departments of the government shall be given to one daily and one weekly newspaper of each of the two principal political parties and to one daily and one weekly neutral newspaper: *Provided*, That the rates of compensation for such service shall in no case exceed the regular commercial rate of the newspaper selected; nor shall

any advertisement be paid for unless published in accordance with section thirty-eight hundred and twenty-eight of the Revised Statutes.

Sec. 2. All laws or parts of laws inconsistent herewith are hereby repealed.

R. S. Sec. 3828—No Newspaper Advertisement Without Authority

No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department; and no bill for any such advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority.

INTERIOR, DEPARTMENT OF

Act March 3, 1875, 18 Stat. 450—Indian Service: Contracts for Supplies; Security Required of Bidders [As Amended by Act May 18, 1916, 39 Stat. 126]

That hereafter all bidders under any advertisement published by the Commissioner of Indian Affairs for proposals for goods, supplies, transportation, and so forth, for and on account of the Indian Service, whenever the value of the goods, supplies, and so forth, to be furnished, or the transportation to be performed, shall exceed the sum of \$5,000, shall accompany their bids with a certified check, draft, or cashier's check, payable to the order of the Commissioner of Indian Affairs, upon some United States depository or some one of such solvent national banks as the Secretary of the Interior may designate, or by an acceptable bond in favor of the United States, which check, draft, or bond shall be for five per centum of the amount of the goods, supplies, transportation, and so forth, as aforesaid; and in case any such bidder, on being awarded a contract, shall fail to execute the same with good and sufficient sureties according to the terms on which such bid was made and accepted, such bidder, or the sureties on his bond, shall forfeit the amount so deposited or guaranteed to the United States, and the same shall forthwith be paid into the Treasury of the United States; but if such contract shall be duly executed, as aforesaid, such draft, check, or bond so deposited shall be returned to the bidder.

Act May 18, 1916, 39 Stat. 129—Indian Service: Advertising for Bids

. . . . That section thirty-seven hundred and nine, Revised Statutes, in so far as that section requires that advertisement be made, shall apply only to those purchases and contracts for supplies or services, except personal services, for the Indian field service which exceed in amount the

sum of \$50 each, and section twenty-three of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and sixty-one), is hereby amended accordingly.

Act June 25, 1910, 36 Stat. 861—Same Subject

Sec. 23. That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed. [See preceding act.]

Act August 15, 1876, 19 Stat. 199—Indian Service: Record of Bids and Report

That in all lettings of contracts in connection with the Indian service, the proposals or bids received shall be filed and preserved; and in the annual report of the Commissioner of Indian Affairs, there shall be embodied a detailed and tabular statement of all bids and proposals received for any services, supplies, or annuity-goods for the Indian service, together with a detailed statement of all awards of contracts made for any such services, supplies, and annuity-goods for which said bids or proposals were received; and an abstract of all bids or proposals received for the supplies or services embraced in any contract shall be attached to, and filed with, the said contract when the same is filed in the office of the Second Comptroller of the Treasury.

Act March 3, 1875, 18 Stat. 450—Indian Service: No Expenditure Beyond Appropriations

That hereafter, it shall be the duty of the Secretary of the Interior, and the officers charged by law with the distribution of supplies to the Indians, under appropriations made by law, to distribute them and pay them out to the Indians entitled to them, in such proper proportions as that the amount of appropriation made for the current year shall not be expended before the end of such current year, so as to prevent deficiencies; and no expenditure shall be made or liability incurred on the part of the Government on account of the Indian service for any fiscal year (unless in compliance with existing law) beyond the amount of money previously appropriated for said service during such year.

Act August 15, 1894, 28 Stat. 312—Contracts for Supplies for Indian Service in Advance of Appropriations

That hereafter the Commissioner of Indian Affairs is authorized to

advertise in the spring of each year for bids, and enter into contracts, subject to the approval of the Secretary of the Interior, for goods and supplies for the Indian service required for the ensuing fiscal year, notwithstanding the fact that the appropriations for such fiscal year have not been made, and the contracts so made shall be on the basis of the appropriations for the preceding fiscal year, and shall contain a clause that no deliveries shall be made under the same and no liability attach to the United States in consequence of such execution if Congress fails to make an appropriation for such contract for the fiscal year for which those supplies are required. . . . [Part omitted, temporary.]

Act March 3, 1875, 18 Stat. 450—Copies of Contracts for Indian Service to be Deposited

. . . . That copies of all contracts made by the Commissioner of Indian Affairs, or any other officer of the Government, for the Indian service, shall be furnished to the Second Auditor of the Treasury before any payment shall be made thereon.

Act June 22, 1874, 18 Stat. 177—Government Agents and Employees Not to be Interested in Indian Contracts

That no agent or employee of the United States Government, or of any of the Departments thereof, while in the service of the Government, shall have any interest, directly or indirectly, contingent or absolute, near or remote, in any contract made, or under negotiation, with the Government, or with the Indians, for the purchase or transportation or delivery of goods or supplies for the Indians, or for the removal of the Indians; nor shall any such agent or employee collude with any person who may attempt to obtain any such contract for the purpose of enabling such person to obtain the same. The violation of any of the provisions of this section shall be a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, and by removal from office; and, in addition thereto, the court shall, in its discretion, have the power to punish by imprisonment of not more than six months.

Act June 17, 1902, 32 Stat. 389—Contracts for Irrigation Works; Eight-Hour Day; No Mongolian Labor

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund. . . . *Provided*, That in all construction

work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

Act March 2, 1919—Validating War Contracts [See under "War Department"]

LABOR, DEPARTMENT OF

IMMIGRATION SERVICE

Act March 3, 1893, 27 Stat. 571—Privileges at Ellis Island Immigrant Station, Disposed of After Public Competition

Sec. 9. That after the first day of January, eighteen hundred and ninety-three, all exclusive privileges of exchanging money, transporting passengers or baggage, or keeping eating houses, and all other like privileges in connection with the Ellis Island immigrant station, shall be disposed of after public competition, subject to such conditions and limitations as the Secretary of the Treasury may prescribe.

NAVY DEPARTMENT

Act March 2, 1891, 26 Stat. 807—Purchase, Classification, and Issue, of Naval Supplies

. . . . All supplies hereafter purchased with moneys appropriated for any branch of the naval establishment shall be purchased, classified, and issued for consumption or use subject to the provisions contained in the Act making appropriations for the naval service, approved June thirtieth, eighteen hundred and ninety, in reference to supplies therein provided for and on hand.

[Note: The act herein referred to will be found immediately following this.]

Act June 30, 1890, 26 Stat. 205—Same Subject

All supplies purchased with moneys appropriated by this act shall be deemed to be purchased for the Navy and not for any bureau thereof, and these supplies, together with all supplies now on hand, shall be arranged, classified, consolidated, and catalogued, and issued for consumption or use, under such regulations as the Secretary may prescribe, without regard to the bureau for which they were purchased.

R. S. Sec. 3720—Record of Bid and Report to Congress

All such proposals for naval supplies shall be preserved and recorded, and reported by the Secretary of the Navy to Congress at the commencement of every regular session. The report shall contain a schedule em-

bracing the offers by classes, indicating such as have been accepted. In case of a failure to supply the articles or to perform the work by the person entering into such contract, he and his sureties shall be liable for the forfeiture specified in such contract, as liquidated damages, to be sued for in the name of the United States.

R. S. Sec. 3719—Naval Supplies: Guarantee of Bid [As Amended by Act May 25, 1896, 29 Stat. 136]

Every proposal for naval supplies invited by the Secretary of the Navy, under the preceding section, shall be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of the Navy, give bond, with good and sufficient sureties, to furnish the supplies proposed; and no proposal shall be considered, unless accompanied by such guarantee. If, after the acceptance of a proposal, and a notification thereof to the bidder, he fails to give such bond within the time prescribed by the Secretary of the Navy, the Secretary shall proceed to contract with some other person for furnishing the supplies; and shall forthwith cause the difference between the amount contained in the proposal so guaranteed and the amount for which he may have contracted for furnishing the supplies, for the whole period of the proposal, to be charged up against the bidder and his guarantor; and the same may be immediately recovered by the United States, for the use of the Navy Department, in an action of debt against either or all of such persons. . . .

[The omitted portion of this act was superseded by act immediately following this.]

Act Dec. 11, 1906, 34 Stat. 841—Naval Supplies: Certified Check with Proposal May be Accepted

That the Secretary of the Navy may, in his discretion, accept, in lieu of the written guaranty required to accompany a proposal for naval supplies, and in lieu of the bond required for the faithful performance of a contract for furnishing such supplies, a certified check, payable to the order of the Secretary of the Navy, for from twenty-five to fifty per centum of the amount of such proposal or contract, the check to be held by the Secretary of the Navy until the requirements of the proposal or contract shall be complied with and as a guaranty for compliance with the same.

R. S. Sec. 3718—Naval Supplies: How Furnished; Advertisement [As Amended by Act June 30, 1890, 26 Stat. 189; Act July 19, 1892, 27 Stat. 243; Act March 3, 1893, 27 Stat. 724]

All provisions, clothing, hemp, and other materials of every name and

nature, for the use of the Navy, and the transportation thereof, when time will permit, shall be furnished by contract, by the lowest bidder, as follows: In the case of provisions, clothing, hemp, and other materials, the Secretary of the Navy shall advertise, twice a week for two weeks or longer, not to exceed four weeks, or once a week for two weeks or longer, not to exceed four weeks, in the discretion of the Secretary of the Navy, in one or more of the principal papers published in the place where such articles are to be furnished, for sealed proposals for furnishing the same, or the whole of any particular class thereof, specifying the classes of materials and referring bidders to the several chiefs of Bureaus, who will furnish them with printed schedules, giving a full description of each and every article, with dates of delivery, and so forth. In the case of transportation of such articles, he shall advertise for a period of not less than five days. All such proposals shall be kept sealed until the day specified in such advertisement for opening the same, when they shall be opened by or under the direction of the officer making such advertisement, in the presence of at least two persons. The person offering to furnish any class of such articles, and giving satisfactory security for the performance thereof, under a forfeiture not exceeding twice the contract price in case of failure, shall receive a contract for furnishing the same.

Act March 2, 1907, 34 Stat. 1193—Purchase of Naval Supplies and Procurement of Services in Open Market

. . . That hereafter the purchase of supplies and the procurement of services for all branches of the naval service may be made in open market in the manner common among business men, without formal contract or bond, when the aggregate of the amount required does not exceed five hundred dollars, and when, in the opinion of the proper administrative officers, such limitation of amount is not designed to evade purchase under formal contract or bond, and equally or more advantageous terms can thereby be secured.

R. S. Sec. 3721—Purchases Without Advertisements

The provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder, or medicines, or the supplies which it may be necessary to purchase out of the United States for vessels on foreign stations, or hunting delivered for the use of the Navy, or tobacco, or butter or cheese destined for the use of the Navy, or things contraband of war. Contracts for butter and cheese for the use of the Navy may be made for periods longer than one year, if, in the opinion of the Secretary of the Navy, economy and the quality of the ration will be promoted thereby. The Secretary of the Navy may enter into contracts for tobacco,

from time to time, as the service requires, for a period not exceeding four years; and in making such contracts he shall not be restricted to the lowest bidder, unless, in his opinion, economy and the best interests of the service will be thereby promoted.

Act March 4, 1913, 37 Stat. 904—Contracts for Provisions: How Awarded

. . . That from and after the passage of this Act all awards of contracts for provisions for the Navy shall be made by individual items; the contract for each item being awarded to the lowest responsible bidder.

Act June 10, 1896, 29 Stat. 370—Tobacco: Purchase of, for Navy

And the Secretary of the Navy is hereby authorized and directed to cause advertisement to be made for tobacco for the use of the Navy, as the needs of the service may require, in the manner prescribed by law for other supplies. Bidders shall submit with their proposals a sample of the tobacco which they propose to furnish, and the contract shall, in the discretion of the Department, be awarded to the bidder whose sample is found by a board of officers to be best adapted for use in the Navy.

Joint Resolution, June 14, 1878, No. 30—Material for Steam Boilers: How Purchased

That on and after the passage of this Act, the Secretary of the Navy be, and he is hereby authorized to purchase at the lowest market price, such plate iron and other material as may enter into the construction of steam boilers for the Navy without advertising for bids to furnish the same: *Provided*, That he shall cause to be sent to the principal dealers and manufacturers of iron and such other materials as may be required specifications of the quality, description and character of such iron and materials so required: *And provided further*, That such plate iron and materials shall be subjected to the same tests and inspection as now provided for and which inspection and tests shall be made publicly and in presence of such bidders or their authorized agents as may choose to attend at the making thereof.

R. S. Sec. 3722—Opening and Rejection of Bids

The chief of any Bureau of the Navy Department, in contracting for naval supplies, shall be at liberty to reject the offer of any person who, as principal or surety, has been a defaulter in any previous contract with the Navy Department. Parties who have made default as principals or sureties in any former contract shall not be received as sureties on other contracts; nor shall the copartners of any firm be received as sureties for such firm or for each other; nor, in contracts with the same Bureau, shall one contractor be received as surety for another. Every contract shall require the delivery of a specified quantity, and no bids having nomi-

nal or fictitious prices shall be considered. If more than one bid be offered by any one party, by or in the name of his or their clerk, partner, or other person, all such bids may be rejected; and no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he offers to supply. All persons offering bids shall have the right to be present when the bids are opened and inspect the same.

Act August 22, 1911, 37 Stat. 32—Partial Payments Authorized; Liens, etc.

. . . That the Secretary of the Navy be, and he hereby is, authorized, in his discretion, to make partial payments from time to time during the progress of the work under existing contracts and all contracts hereafter made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts hereafter made shall provide for a lien in favor of the Government, which lien is hereby made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: *Provided*, That partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions.

R. S. Sec. 3723—Contracts for and Purchases of Foreign Supplies for the Navy

No chief of a Bureau shall make any contract for supplies for the Navy, to be executed in a foreign country, except it be on first advertising for at least thirty days in two daily newspapers of the city of New York, inviting sealed bids for furnishing the supplies desired; which bids shall be opened in the presence of the Secretary of the Navy and the heads of two Bureaus; and contracts shall in all cases be awarded to the lowest bidder; and paymasters for the Navy on foreign stations shall render, when practicable, with their accounts, an official certificate from the resident consul, or commercial or consular agent of the United States, if there be one, to be furnished gratuitously, vouching that all purchases and expenditures made by the paymasters were made at the ruling market-prices of the place at the time of purchase or expenditure.

R. S. Sec. 3724—Rejection of Excessive Bids

Where articles are advertised and bid for in classes, and in the judgment of the Secretary of the Navy any one or more articles appear to be bid for at excessive or unreasonable prices, exceeding ten per centum above their fair market-value, he shall be authorized to reject such bid.

R. S. Sec. 3725—Hemp

All hemp, or preparations of hemp, used for naval purposes by the

Government of the United States, shall be of American growth or manufacture, when the same can be obtained of as good quality and at as low a price as foreign hemp.

R. S. Sec. 3726—Preserved Meats, etc.

The Secretary of the Navy is authorized to procure the preserved meats, pickles, butter, and desiccated vegetables, in such manner and under such restrictions and guarantees as in his opinion will best insure the good quality of said articles.

R. S. Sec. 3727—Flour and Bread

The Secretary of the Navy is authorized to purchase, in such manner as he shall deem most advantageous to the Government, the flour required for naval use; and to have the bread for the Navy baked from this flour by special contract under naval inspection.

Act March 3, 1893, 27 Stat. 732—Contracts for Gun Steel or Armor for Navy

. . . That no contract for the purchase of gun steel or armor for the Navy shall hereafter be made until the subject-matter of the same shall have been submitted to public competition by the Department by advertisement.

R. S. Sec. 3728—Home Manufacturers to be Preferred

The Secretary of the Navy, in making contracts and purchases of articles for naval purposes, shall give the preference, all other things, including price and quality, being equal, to articles of the growth, production, and manufacture of the United States. In purchasing fuel for the Navy, or for naval stations and yards, the Secretary of the Navy shall have power to discriminate and purchase, in such manner as he may deem proper, that kind of fuel which is best adapted to the purpose for which it is to be used.

R. S. Sec. 3729—Bunting

The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury may enter into contract, in open market, for bunting of American manufacture, as their respective services require, for a period not exceeding one year, and at a price not exceeding that at which an article of equal quality can be imported.

R. S. Sec. 3730—Relinquishment of Reservations on Deliveries

The Secretary of the Navy may relinquish and pay all reservations of the ten per centum upon deliveries made under contracts with the

Navy Department, where these reservations have arisen and the contracts have been afterward extended, or where the contracts have been completed after the time of delivery, by and with the consent of the Department, or where the contracts have been dissolved by the like consent, or have been terminated, or an extension thereof has been prevented by operation of law, where no injury has been sustained by the public service.

R. S. Sec. 3731—Name of Contractor to Appear on Supplies

Every person who shall furnish supplies of any kind to the Army or Navy shall be required to mark and distinguish the same with the name of the contractor furnishing such supplies, in such manner as the Secretary of War and the Secretary of the Navy may, respectively, direct; and no supplies of any kind shall be received, unless so marked and distinguished.

Act October 6, 1917, 40 Stat. 383—Advance Payments to Contractors

Sec. 5. That the Secretary of War and the Secretary of the Navy are authorized, during the period of the existing emergency, from appropriations available therefor to advance payments to contractors for supplies for their respective departments in amounts not exceeding thirty per centum of the contract price of such supplies: *Provided*, That such advances shall be made upon such terms as the Secretary of War and the Secretary of the Navy, respectively, shall prescribe and they shall require adequate security for the protection of the Government for the payments so made.

Act August 29, 1916, 39 Stat.—Naval Appropriation

LEASE OF NAVAL LANDS: That authority be, and is hereby given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: *Provided*, That the authority herein granted shall not be held to apply to oil, mineral, or phosphate lands: *Provided further*, That all moneys received from such leases shall be covered into the Treasury as miscellaneous receipts.

That the Secretary of the Navy shall cause to be estimated annually the amount necessary for carrying out the provisions of this Act, and no money shall be expended under said provisions, except as shall, from time to time, be appropriated for carrying them out.

The Secretary of the Navy is hereby authorized to sell any or all of the auxiliary ships of the Navy classified as colliers, transports,

tenders, supply ships, special types, and hospital ships, which are eighteen years and over in age, which he deems unsuited to present needs of the Navy and which can be disposed of at an advantageous price, which shall not be less than fifty per centum of their original cost, the money obtained from such sale to be covered into the Treasury as miscellaneous receipts.

That no part of any sum herein appropriated shall be expended for the purchase of structural steel, ship plates, armor, armament, or machinery from any persons, firms, or corporations who are parties to any existing combination or conspiracy to monopolize the interstate or foreign commerce or trade of the United States, or the commerce or trade between the States and any Territory or the District of Columbia, in any of the articles aforesaid, and no purchase of structural steel, ship plates, or machinery shall be made at a price in excess of a reasonable profit above the actual cost of manufacture. But this limitation shall in no case apply to any existing contract.

Bureau of Construction and Repair

CONSTRUCTION AND REPAIR OF VESSELS: For preservation and completion of vessels on the stocks and in ordinary; purchase of materials and stores of all kinds; steam steerers, pneumatic steerers, steam capstans, steam windlasses, and all other auxiliaries; labor in navy yards and on foreign stations; purchase of machinery and tools for use in shops; carrying on work of experimental model tank and wind tunnel; designing naval vessels; construction and repair of yard craft, lighters, and barges; wear, tear, and repair of vessels afloat; general care, increase, and protection of the Navy in the line of construction and repair; incidental expenses for vessels and navy yards, inspectors' offices, such as photographing, books, professional magazines, plans, stationery, and instruments for drafting room, and for pay of classified force under the bureau; for hemp, wire, iron, and other materials for the manufacture of cordage, anchors, cables, galleys, and chains; specifications for purchase thereof shall be so prepared as shall give fair and free competition; canvas for the manufacture of sails, awnings, hammocks, and other work; interior appliances and tools for manufacturing purposes in navy yards and naval stations; and for the purchase of all other articles of equipage at home and abroad; and for the payment of labor in equipping vessels therewith and manufacture of such articles in the several navy yards; naval signals and apparatus, other than electric, namely, signals, lights, rockets, running lights, lanterns, and lamps and their appendages for general use on board ship for illuminating purposes, and oil and candles used in connection therewith; bunting and other materials for making and repairing flags of all kinds; for all permanent galley fittings and equipage; rugs, carpets, curtains, and hangings on board naval vessels, installing gun

foundations on Panama Canal colliers Ulysses and Achilles, \$10,071,069.16: *Provided*, That no part of this sum shall be applied to the repair of any wooden ship when the estimated cost of such repairs, to be appraised by a competent board of naval officers, shall exceed ten per centum of the estimated cost, appraised in like manner, of a new ship of the same size and like material: *Provided further*, That no part of this sum shall be applied to the repair of any other ship when the estimated cost of such repairs, to be appraised by a competent board of naval officers, shall exceed twenty per centum of the estimated cost, appraised in like manner, of a new ship of the same size and like material: *Provided further*, That nothing herein contained shall deprive the Secretary of the Navy of the authority to order repairs of ships damaged in foreign waters or on the high seas, so far as may be necessary to bring them home.

To provide for the speedy construction of the vessels herein authorized and for the additional cost incident thereto, including the employment of more than one shift of labor per day, overtime work, and the speedy delivery of material, the Secretary of the Navy in his discretion is hereby authorized to increase the total cost of each of said vessels, including armor and armament, not to exceed twenty per centum thereof if any of said vessels be constructed in Government navy yards; and if any of said vessels or the armor or armament for same be constructed by private contract, the Secretary of the Navy in his discretion is hereby authorized to prescribe in the contracts for same provisions for the payment of premiums over and above the contract price, not to exceed twenty per centum thereof, for the most expeditious delivery of same, and further provisions for penalties for delays and failure to complete within the contract time: *Provided*, That if, in the judgment of the Secretary of the Navy, the most rapid and economical construction of the battle cruisers authorized herein can be obtained thereby, he may contract for the construction of any or all of them upon the basis of actual cost, plus a reasonable profit to be determined by him.

The Secretary of the Navy is authorized to improve and equip the navy yards at Puget Sound, Philadelphia, Norfolk, New York, Boston, Portsmouth, Charleston, and New Orleans for the construction of such ships herein or as may be hereafter authorized as may be assigned to such yards for construction, and the sum of \$6,000,000, or so much thereof as may be necessary, is hereby appropriated for this purpose: *Provided*, That the Secretary of the Navy is authorized to equip the navy yards at Norfolk, Philadelphia, Boston, and Puget Sound for the construction of capital ships.

Act July 1, 1918—Naval Appropriation

(a) That the word "person" as used in paragraph (b), (c), next

hereafter shall include any individual, trustee, firm, association, company, or corporation. The word "ship" shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words "war material" shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word "factory" shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

(b) The President is hereby authorized and empowered, within the limits of the amounts appropriated therefor:

First. To place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war materials so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified, the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof, without taking possession of the entire factory, whether the United States has or has not any contract with the owner or occupier of such factory.

That all authority granted to the President herein or by him delegated shall cease six months after a final treaty of peace shall be proclaimed between this Government and the German Empire.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

That the Act approved October sixth, nineteen hundred and seventeen, to provide for the acquisition of an air station site for the United States Navy at Cape May, New Jersey, be and the same is hereby, amended by adding the following at the end thereof:

"And provided further, That in the event the Secretary of the Navy is unable satisfactorily to consummate the negotiations for the purchase thereof under the provisions of said Act approved October sixth, nineteen hundred and seventeen, the President is hereby authorized and empowered to take over for and in behalf of the United States the immediate possession of and title to such land, including all easements, rights of way, riparian and other rights appurtenant or appertaining thereto deemed by him to be necessary for the purposes aforesaid, and to make compensation therefor under the terms and provisions of the legislation contained in this Act; and the appropriation of \$150,000 appropriated in said Act, approved October sixth, nineteen hundred and seventeen, or so much thereof as may be necessary, is hereby made available for the payment of compensation for said property so taken over by the President."

Bureau of Ordnance

ORDNANCE AND ORDNANCE STORES: For procuring, producing, preserving, and handling ordnance material; for the armament of ships; for fuel, material, and labor to be used in the general work of the ordnance department; for furniture at naval and munition depots, torpedo stations, and proving grounds; for necessary improvements at

and maintenance of proving grounds, powder factory, torpedo stations, gun factory, ammunition depots, and armor and projectile plant, and for target practice; for the maintenance, repair, or operation of horse-drawn and motor-propelled passenger-carrying vehicles, to be used only for official purposes at naval ammunition depots, naval proving grounds, and naval torpedo stations, and for pay of chemists, clerical, drafting, inspection, and messenger service in navy yards, naval stations, and naval ammunition depots: *Provided*, That the sum to be paid out of this appropriation under the direction of the Secretary of the Navy for chemists, clerical, drafting, inspection, watchmen, and messenger service in navy yards, naval stations, and naval ammunition depots for the fiscal year ending June thirtieth, nineteen hundred and nineteen, shall not exceed \$2,950,000; in all, \$30,522,279: *Provided further*, That ordnance materials procured under the various Ordnance appropriations shall hereafter be available for issue, to meet the general needs of the naval service, under the appropriation from which procured.

Purchase and manufacture of smokeless powder, \$2,400,000.

NEW BATTERIES FOR SHIPS OF THE NAVY: For batteries and outfits for naval vessels, auxiliaries, patrols, aircraft, naval stations, and merchantmen, \$85,014,110.50: *Provided*, That the Secretary of the Navy is authorized to enter into contracts or otherwise to incur obligations for the purposes above mentioned not to exceed \$20,000,000 in addition to the appropriations herein and heretofore made: *Provided further*, That \$41,259,523.50 of this amount shall be available to meet obligations authorized under this heading in the Act of October sixth, nineteen hundred and seventeen, and the Act of March twenty-eighth, nineteen hundred and eighteen.

AMMUNITION FOR VESSELS: For procuring, producing, preserving, and handling ammunition for vessels, \$73,289,530.

POST-OFFICE DEPARTMENT

Act April 28, 1904, 33 Stat. 440—Purchase of Supplies

The purchasing agent, in making purchases for supplies necessary for the Post-Office Department, shall advertise, as now provided by law, and award contracts for such supplies to the lowest responsible bidder in pursuance of existing law. The purchasing agent shall have recorded in a book to be kept for that purpose a true and faithful abstract of all bids made for furnishing supplies to the Post-Office Department, giving the name of the party bidding, the terms of the offer, the sum to be paid, and he shall keep on file and preserve all such bids until the end of the contract term to which they relate. Each bidder shall have the right to

be present, either in person or by attorney, when the bids are opened, and shall have the right to examine and inspect all bids. All purchases, advertisements, and contracts for supplies for the Post-Office Department shall be made by the purchasing agent in the name of the Postmaster-General subject to his approval, and in purchasing such supplies preference shall be given to articles of domestic production and manufacture, conditions of price and quality being equal. There shall be separate proposals and separate contracts for each class of material furnished. These records shall be open at all times for the inspection of Congress, and for the inspection of those who may be interested in such contracts made, or to be made, to furnish supplies to the Post-Office Department.

Act June 26, 1906, 34 Stat. 476—Contracts for Envelopes by Postmaster-General

The Postmaster-General is authorized to extend, for a period not exceeding six months, the contract for official, registry, and dead letter envelopes for the postal service for the calendar year ending December thirty-first, nineteen hundred and six; and thereafter the Postmaster-General shall contract, for a period not exceeding four years, for all envelopes, stamped or otherwise, designed for sale to the public, or for use by the Post-Office Department, the postal service, and other Executive Departments, and all Government bureaus and establishments, and the branches of the service coming under their jurisdiction, and may contract for them to be plain or with such printed matter as may be prescribed by the Department making requisition therefor: *Provided*, That no envelope shall be sold by the Government containing any lithographing or engraving, nor any printing nor advertisement, except a printed request to return the letter to the writer.

Act June 26, 1906, 34 Stat. 475—Contracts for Stamps, etc., with Another Department or Bureau, Not to be Below Cost of Work

. . . . That no contract for the manufacture of adhesive postage stamps, special-delivery stamps, or books of stamps shall be made by the Government with any Department or Bureau of the Government below the cost of such work to the Government.

Act May 12, 1910, 36 Stat. 365—Contracts for Postal Cards; Restrictions

. . . . That no contract for the manufacture of postal cards shall be made by the Government with any department or bureau of the Government at any higher rate than offered for the same work by any responsible contractor, nor shall the bid of such department or bureau be below the cost of such work to the Government.

Act April 21, 1902, 32 Stat. 114—Contracts for Supplies May be Made for Four Years

And hereafter the Postmaster-General is authorized to contract for a term not exceeding four years, for the supply of any or all articles enumerated under the head of "Supply Division," when, in his judgment, it shall appear to be for the best interests of the service.

Act April 28, 1904, 33 Stat. 435—Material or Supplies Manufactured by Convict Labor Not to be Purchased

. . . . That hereafter no contract shall be entered into by the Post-Office Department for purchase of material or supplies to be manufactured by convict labor.

Act August 24, 1912, 37 Stat. 553—No Contracts for Supplies to be Made with Persons Combining to Fix Prices; Penalty

. . . . No contract for furnishing supplies to the Post-Office Department or the postal service shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for furnishing such supplies, or to fix a price or prices therefor, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract, or to bid at a specified price or prices thereon; and if any person so offending is a contractor for furnishing such supplies, his contract may be annulled, and the person so offending shall be liable to a fine of not less than one hundred dollars nor more than five thousand dollars, and may be further punished, in the discretion of the court, by imprisonment for not less than three months nor more than one year.

Act March 4, 1911, 36 Stat. 1333—Contract Term for Rental or Canceling Machines

That hereafter the Postmaster-General may, in his discretion, enter into contracts for a period of not exceeding four years for the rental of canceling machines, ...

Act March 9, 1914, 38 Stat. 303—Contracts for Canceling Machines; How Made

. . . . That hereafter no contract shall be made for any canceling machine for more than \$270 per annum, including repairs on said machine, and that all contracts entered into shall be let after having advertised for bids and shall be awarded on the basis of cheapness and efficiency.

Act March 3, 1917, 39 Stat. 1063—Contract Term for Lease of Premises for Post-Offices; Restrictions

Provided, That the Postmaster-General may, in the disbursement of

the appropriation for such purposes, apply a part thereof to the purpose of leasing premises for the use of post-offices of the first, second, and third classes at a reasonable annual rental, to be paid quarterly for a term not exceeding ten years; and that there shall not be allowed for the use of any third-class post-office for rent a sum in excess of \$500, nor more than \$100 for fuel and light, in any one year.

Joint Resolution March 24, 1874, 18 Stat. 286—Contracts for Mail Bags, etc., Not Limited to One Year

That the resolution approved January thirty-first, eighteen hundred and sixty-eight, entitled "A resolution limiting contracts for stationery and other supplies in the Executive Departments to one year," shall not be held, or construed, to apply to, or include mail-bags, mail locks and keys, postal cards, postage stamps, newspaper wrappers, or stamped envelopes.

Act March 2, 1889, 25 Stat. 844—Contracts for Supplies for Free-Delivery Service May be Made for Four Years

. . . . That the Postmaster-General may, when if in his judgment the good of the service so requires make contract for necessary supplies for the free-delivery service for a period not exceeding four years.

Act March 2, 1895, 28 Stat. 803—Term of contract for Post Route Maps

. . . . And the Postmaster-General may, in his discretion, cause the contract for printing post-route maps to be let for a term of four years;

Act May 28, 1896, 29 Stat. 176—Term of Contract for Official Postal Guide

. . . . And the Postmaster-General may, in his discretion, cause the contract for furnishing the Official Postal Guide to be let for a term of four years.

PUBLIC PRINTING

Act January 12, 1895, 28 Stat. 601—Public Printing and Binding; Joint Committee on Printing Created

That there shall be a Joint Committee on Printing, consisting of three members of the Senate and three members of the House of Representatives, who shall have the powers hereinafter stated.

Standards of Paper and Advertisements for Proposals

Sec. 3. The Joint Committee on Printing shall fix upon standards of paper for the different descriptions of public printing and binding, and the Public Printer shall, under their direction, advertise in two newspapers, published in each of the cities of Boston, New York, Philadelphia, Baltimore, Washington, Cincinnati, Saint Louis, Louisville, Omaha, Denver, San Francisco, and Chicago, for sealed proposals to furnish the Government with paper, as specified in the schedule to be furnished to applicants by the Public Printer, setting forth in detail the quality and quantities required for the public printing. And the Public Printer shall furnish samples of the standard of papers fixed upon to applicants therefor who shall desire to bid.

Specifications

Sec. 4. The advertisements shall specify the minimum portion of each quality of paper required for either three months, six months, or one year, as the Joint Committee on Printing may determine; but when the minimum portion so specified exceeds, in any case, one thousand reams, it shall state that proposals will be received for one thousand reams or more.

Opening Bids; Bonds Required

Sec. 5. The sealed proposals to furnish paper shall be opened in the presence of the Joint Committee on Printing, and the contracts shall be awarded by them to the lowest and best bidder for the interest of the Government; but they shall not consider any proposal which is not accompanied by a bond approved by a judge or clerk of a court of record in the penalty of five thousand dollars that the bidder or bidders, if his or their proposal is accepted, shall enter into a contract to furnish the articles proposed for and by satisfactory evidence that the person making it is a manufacturer of or dealer in the description of paper which he proposes to furnish.

Approval of Contract; Award; Bonds

Sec. 6. No contract for furnishing paper shall be valid until it has been approved by the Joint Committee on Printing, if made under their direction, or by the Secretary of the Interior, if made under his direction, according to the provisions of section nine of this Act. The award of each contract for furnishing paper shall designate a reasonable time for its performance. The contractor shall give bond in such amount as may be fixed by, and to the approval of, the Joint Committee on Printing.

Paper Must Conform to Standard

Sec. 7. The Public Printer shall compare every lot of paper delivered by any contractor with the standard of quality fixed upon by the Joint Committee on Printing, and shall not accept any paper which does not conform to it in every particular.

Settlement of Disputes

Sec. 8. In case of difference of opinion between the Public Printer and any contractor for paper respecting its quality, the matter of difference shall be determined by the Joint Committee on Printing or by the Secretary of the Interior when Congress is not in session, and the decision of said Joint Committee or of the Secretary of the Interior shall be final as to the United States.

Default of Contractor; New Contracts and Purchase in Open Market During Interval

Sec. 9. If any contractor shall fail to comply with his contract, the Public Printer shall report such default to the Joint Committee on Printing, when Congress is in session, or to the Secretary of the Interior when Congress is not in session; and he shall, under the direction of the Committee, or of the Secretary of the Interior, as the case may be, enter into a new contract with the lowest, best and most responsible bidder for the interest of the Government among those whose proposals were rejected at the last opening of bids, or he shall advertise for new proposals, under the regulations hereinbefore stated; and during the interval which may thus occur he shall, under the direction of the Joint Committee on Printing, or of the Secretary of the Interior, purchase in open market, at the lowest market price, all paper necessary for the public printing.

Contractor's Liability; Suit on Bond

Sec. 10. In case of the default of any contractor to furnish paper, he and his sureties shall be responsible for any increase of cost to the Government in procuring a supply of such paper which may be consequent upon such default. The Public Printer shall report every such default, with a full statement of all the facts in the case, to the Solicitor of the Treasury, who shall prosecute the defaulting contractor and his sureties upon their bond, in the circuit court of the United States in the district in which such defaulting contractors reside.

Open-Market Purchases of Paper

Sec. 11. The Joint Committee on Printing, or during the recess of Congress the Secretary of the Interior, may authorize the Public Printer to make purchase of paper in open market whenever they may deem

the quantity required so small or the want so immediate as not to justify advertisement for proposals.

Open-Market Purchases of Other Materials

Sec. 12. The Joint Committee is authorized to give permission to the Public Printer to purchase material other than paper in open market, whenever in their opinion it would not promote the public interest to advertise for proposals and to make contracts for the same: *Provided, however,* That the purchases authorized by this Act shall not in any term of six months exceed the sum of fifty dollars for any particular article required.

Lithographing and Engraving; Contracts For

Sec. 15. When the probable total cost of the maps or plates accompanying one work or document exceeds twelve hundred dollars, the lithographing or engraving thereof shall be awarded to the lowest and best bidder, after advertisement by the Public Printer, under the direction of the Joint Committee, which may authorize him to make immediate contracts for lithographing or engraving whenever the exigencies of the public service do not justify advertisement for proposals.

Schedule of Materials; Advertisements; Proposals; Contracts

Sec. 16. The Public Printer shall prepare a schedule of materials required to be purchased, showing the description, quantity, and quality of each article, and shall invite proposals for furnishing the same, either by advertisement or circular, as the Joint Committee on Printing may direct, and shall make contracts for the same with the lowest responsible bidder, making a return of the same to the Joint Committee, showing the number of bidders, the amounts of each bid, and the awards of the contracts.

Report to Congress of Contracts, etc.

Sec. 22. The Public Printer shall, on the first day of each regular session, report to Congress the exact condition and the quantity and cost of all printing, binding, lithographing, and engraving; the quantity and cost of all paper purchased for the same; a detailed statement of all proposals and contracts entered into for the purchase of paper and other materials, and for lithographing and engraving; of all payments made, during the preceding year, under his direction; of the quantity of work ordered and done, with a general classification thereof, for each Department, and a detailed statement of each account with the Departments or public officers; a classified detailed statement of the number of hands employed and the sums paid to each; and such other information touching all matters connected with the Printing Office as may be in his possession.

Officers and Assistants Not to be Interested in Printing Contracts

Sec. 34. Neither the Public Printer, chief clerk, foreman of printing, foreman of binding, nor any of their assistants shall, during their continuance in office, have any interest, direct or indirect, in the publication of any newspaper or periodical, or in any printing, binding, engraving, or lithographing of any kind, or in any contract for furnishing paper or other material connected with the public printing, binding, lithographing, or engraving; and for every violation of this section the party offending shall, on conviction before any court of competent jurisdiction, be imprisoned in the penitentiary for a term of not less than one nor more than five years, and shall be fined not exceeding five hundred dollars.

Purchase of Press Supplies

Sec. 38. The Public Printer may purchase in open market, and without previous advertising, such supplies as the Government Printing Office may require, of ink, rollers, composition for making rollers, tapes, press blankets, and lubricating oils, taking care that only the lowest market prices be paid; and when practicable he shall issue circulars inviting bids.

Act March 30, 1888, 25 Stat. 57.—Public Printer to Enforce Eight-Hour Law

And the Public Printer is hereby directed to rigidly enforce the provisions of the eight-hour law in the Department under his charge.

TREASURY DEPARTMENT**PUBLIC BUILDING CONTRACTS**

[See also Public Works Contracts of Secretary of War, page 279.]

R. S. Sec. 3663—Estimates for Appropriations for Public Works [As Amended by Act February 27, 1877, 19 Stat. 249]

Whenever any estimate submitted to Congress by the head of a Department asks an appropriation for any new specific expenditure, such as the erection of a public building, or the construction of any public work, requiring a plan before the building or work can be properly completed, such estimate shall be accompanied by full plans and detailed estimates of the cost of the whole work. All subsequent estimates for any such work shall state the original estimated cost, the aggregate amount theretofore appropriated for the same, and the amount actually expended thereupon, as well as the amount asked for the current year for which such estimate is made. And if the amount asked is in excess of the original estimate, the full reasons for the excess, and the extent of the anticipated excess, shall be also stated.

R. S. Sec. 3733—No Contract to Exceed Appropriation

No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

Act August 7, 1882, 22 Stat. 305—Purchase of Sites; Appropriations Must be in Express Language

. . . That no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon shall be held or construed to appropriate money unless the act in express language makes such appropriations.

**R. S. Sec. 3734—Restrictions on Commencement of New Buildings
[As Amended by Act June 25, 1910, 36 Stat. 699]**

. . . And hereafter no money shall be paid nor contracts made for payment for any site for a public building in excess of the amount specifically appropriated therefor; and no money shall be expended upon any public building until after sketch plans showing the tentative design and arrangement of such building, together with outline description and detailed estimates of the cost thereof shall have been made by the Supervising Architect of the Treasury Department (except when otherwise authorized by law) and said sketch plans and estimates shall have been approved by the Secretary of the Treasury and the head of each executive department who will have officials located in such building; but such approval shall not prevent subsequent changes in the design, arrangement, materials, or methods of construction or cost which may be found necessary or advantageous: *Provided*, That no such changes shall be made involving an expense in excess of the limit of cost fixed or extended by Congress, and all appropriations made for the construction of such building shall be expended within the limit of cost so fixed or extended.

Act May 30, 1908, 35 Stat. 545—Contracts for Public Buildings Where Appropriations Are in Part Only

That hereafter in all cases where appropriations are made in part only for carrying into effect the provisions of legislation authorizing the acquisition of land for sites or for the enlargement of sites for public buildings, or for the erection or remodeling, extension, alteration, and repairs of public buildings, the Secretary of the Treasury, unless otherwise specifically directed, be, and he is hereby, authorized and empowered to enter into contracts within the full limit of cost fixed by Congress therefor.

Act June 23, 1874, 18 Stat. 275—Public Buildings; Appropriations for, Available Until Completion of Work

. . . That all moneys heretofore appropriated for the con-

struction of public buildings and now remaining to the credit of the same on the books of the Treasury Department, or which may hereafter be appropriated for such buildings, shall remain available until the completion of the work for which they are, or may be, appropriated; and upon the final completion of each or any of said buildings, and the payment of all outstanding liabilities therefor, the balance or balances remaining shall be immediately covered into the Treasury.

Act August 13, 1894, 28 Stat. 278—Protection of Material Men and Laborers; Bonds Required of Contractors [As Amended by Act February 24, 1905, 33 Stat. 811]

That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and

execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the surety's liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

Act June 6, 1902, 32 Stat. 326—Stipulation for Liquidated Damages and Effect Thereof

Sec. 21. That in all contracts entered into with the United States, after the date of the approval of this Act, for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is hereby authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

Act March 3, 1887, 24 Stat. 512—Public Buildings; Contracts for Heating Apparatus

That contracts shall be made by the Secretary of the Treasury for furnishing and putting in heating apparatus for public buildings, upon

advertisements in some leading newspaper in the State where each building is situated, containing specifications of the kind of heating apparatus required, and such contracts shall be made with the lowest responsible bidder therefor.

TRANSPORTATION AND OTHER CONTRACTS

Act July 7, 1884, 23 Stat. 204—Transportation of Moneys, Bullion, Coin, etc.

. . . . Hereafter whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, after notice to all parties having means of transportation

Act June 22, 1874, 18 Stat. 191—Public Cartage to be Let to Lowest Bidder; Regulations

Sec. 25. That public cartage of merchandise in the custody of the Government shall be let after not less than thirty days' notice of such letting to the lowest responsible bidder giving sufficient security, and shall be subject to regulations approved by the Secretary of the Treasury.

Joint Resolution May 5, 1894, No. 24—Advances for Work on Vessels for Treasury Department; Lien

That the Secretary of the Treasury be, and he hereby is, authorized to make partial payments, from time to time, upon existing contracts and all contracts hereafter made for the construction of vessels for the Treasury Department, but not in excess of seventy-five per cent of the amount of the value of the work already done; and that the contracts hereafter made shall provide for a lien upon such vessels for all advances so made: *Provided*, That nothing in this Joint Resolution shall be construed to hereafter authorize any partial payments, except on contracts stipulating for the same and then only in accordance with such contract stipulation.

WAR DEPARTMENT

SUPPLIES AND SERVICES FOR ARMY

R. S. Sec. 3714—Contracts for the Military or Naval Service and Settlement of Accounts [As Amended by Act of February 27, 1877, 19 Stat. 249]

All purchases and contracts for supplies or services for the military and naval service shall be made by or under the direction of the chief officers of the Departments of War and of the Navy, respectively. And

all agents or contractors for supplies or service as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the officers of the Treasury in the manner before prescribed.

Act April 10, 1878, 20 Stat. 36—Regulations for Bids [As Amended by Act March 3, 1883, 22 Stat. 487]

That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department. And he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons.

R. S. Sec. 3715—Contracts for Army Subsistence; Delivery

Contracts for subsistence supplies for the Army, made by the Commissary-General, on public notice, shall provide for a complete delivery of such articles, on inspection, at such places as shall be stipulated.

R. S. Sec. 3716—Advertisements for Supplies for Quartermaster's Department

The Quartermaster's Department of the Army, in obtaining supplies for the military service, shall state in all advertisements for bids for contracts that a preference shall be given to articles of domestic production and manufacture, conditions of price and quality being equal, and that such preference shall be given to articles of American production and

manufacture produced on the Pacific coast, to the extent of the consumption required by the public service there. In advertising for Army supplies the Quartermaster's Department shall require all articles which are to be used in the States and Territories of the Pacific coast to be delivered and inspected at points designated in those States and Territories; and the advertisements for such supplies shall be published in newspapers of the cities of San Francisco, in California, and Portland, in Oregon.

R. S. Sec. 1133—Duties of Quartermaster's Corps

It shall be the duty of the officers of the Quartermaster's Department, under the direction of the Secretary of War, to purchase and distribute to the Army all military stores and supplies, requisite for its use, which other corps are not directed by law to provide; to furnish means of transportation for the Army, its military stores and supplies, and to provide for and pay all incidental expenses of the military service which other corps are not directed to provide for and pay.

Act June 12, 1906, 34 Stat. 258—Purchase of Army Supplies and Procurement of Services in Open Market

Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among business men, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe.

Act February 24, 1891, 26 Stat. 769—Purchase of Steel: Advertisement Required

That no contract for the expenditure of any portion of the money herein provided, or that may be hereafter provided for the purchase of steel shall be made until the same shall have been submitted to public competition by the Department by advertisement.

Act July 5, 1884, 23 Stat. 109—Purchases of Supplies for Quartermaster's and Commissary Departments; Transportation of Stores for Army by Private Parties

. . . . That hereafter all purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster's Department and by the Commissary Department for immediate use shall be made by the officers of such Department, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided also*, That all purchases of said supplies, except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public

notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids. . . . [Part omitted, repealed and superseded.] And that all transportation of stores by private parties for the Army shall be done by contract, after due legal advertisement, except in cases of emergency, which must be at once reported to the Secretary of War for his approval. . . .

Act Feb. 12, 1895, 28 Stat. 658—Purchase of Exceptional Articles of Subsistence Stores

. . . . And hereafter exceptional articles of subsistence stores for officers and enlisted men, which are to be paid for by them, regardless of condition upon arrival at posts, may, under regulations to be prescribed by the Secretary of War, be obtained by open purchase without advertising.

Act July 5, 1884, 23 Stat. 109—Purchases of Horses for Cavalry, Artillery, etc.

. . . . That hereafter all purchases of horses under appropriations for horses for the cavalry and artillery and for the Indian scouts shall be made by contract, after legal advertisement, by the Quartermaster's Department, under instructions of the Secretary of War, the horses to be inspected under the orders of the General commanding the Army; and no horse shall be received and paid for until duly inspected. . . . [Part omitted, repealed.]

[Though permanent in form, this section has been followed by others of similar import in the annual appropriation acts for the Army. That found in the Act of October 6, 1917, 40 Stat. 362, is as follows]:

HORSES FOR CAVALRY, ARTILLERY, AND ENGINEERS: For the purchase of horses of ages, sex, and size as may be prescribed by the Secretary of War for remounts, for officers entitled to public mounts for the Cavalry, Artillery, Signal Corps, and Engineers, the United States Military Academy, service schools, and staff colleges, and for the Indian scouts, and for such Infantry and members of the Medical Department in field campaigns as may be required to be mounted, and the expenses incident thereto, and for the hire of employees: *Provided*, That the number of horses purchased under this appropriation, added to the number now on hand, shall be limited to the actual needs of the mounted service, including reasonable provisions for remounts, and, unless otherwise ordered by the Secretary of War, no part of this appropriation shall be paid out for

horses not purchased by contract after competition duly invited by the Quartermaster Corps and an inspection under the direction and authority of the Secretary of War. When practicable, horses shall be purchased in open market at all military posts or stations, when needed, at not exceeding a maximum price to be fixed by the Secretary of War: *Provided further*, That no part of this appropriation shall be expended for the purchase of any horse below the standard set by Army Regulations for Cavalry and Artillery horses, except when purchased as remounts or for instruction of cadets at the United States Military Academy: *And provided further*, That no part of this appropriation shall be expended for polo ponies except for West Point Military Academy, and such ponies shall not be used at any other place, \$40,000,000.

Act October 6, 1917, 40 Stat. 359—Printing for Quartermaster Corps

That no part of the appropriations for the Quartermaster Corps shall be expended on printing unless the same shall be done at the Government Printing Office, or by contract after due notice and competition, except in such cases as the emergency will not admit of the giving notice of competition, and in cases where it is impracticable to have the necessary printing done by contract the same may be done, with the approval of the Secretary of War, by the purchase of material and hire of the necessary labor for the purpose.

Act May 12, 1917, 40 Stat. 74—Printing for Army During War

. . . . That section eighty-seven of the printing and binding Act, approved January twelfth, eighteen hundred and ninety-five (volume twenty-eight, Revised Statutes, page six hundred and twenty-two), and section two of the Act approved June thirtieth, nineteen hundred and six (volume thirty-four, Revised Statutes, page seven hundred and sixty-two), are hereby amended as follows:

"That in time of actual hostilities the Secretary of War may procure from commercial or other printing establishments, by contract or open market purchase, such printing and binding as may be required for the use of the Army and also for the National Guard of the several States and Territories and of the District of Columbia or other military forces while in the military service of the United States or about to be called into said service, payment for such printing and binding to be made from available appropriations."

Purchases of Means of Transportation by Quartermaster's Department; Transporting Property

. . . . That hereafter all purchases of horses, mules, or oxen, wagons, carts, drays, ships and other seagoing vessels, also all other means

of transportation, shall be made by the Quartermaster's Department, by contract, after due legal advertisement except in cases of extreme emergency; [Part omitted, repealed.] *Provided also*, That hereafter the Quartermaster-General and his officers, under his instructions, wherever stationed, shall receive, transport, and be responsible for all property turned over to them, or any one of them, by the officers or agents of any Government survey, for the National Museum, or for the civil or naval departments of the Government, in Washington or elsewhere, under the regulations governing the transportation of Army supplies, the amount paid for such transportation to be refunded or paid by the Bureau to which such property or stores pertain.

Act March 4, 1915, 38 Stat. 1078—Contracts of Quartermaster Corps to be in Writing

. . . . That hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster-General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster-General.

Act May 1, 1888, 25 Stat. 112—Purchases of Technical and Scientific Supplies for Military Academy

. . . . That all technical and scientific supplies for the departments of instruction of the Military Academy shall be purchased by contract or otherwise, as the Secretary of War may deem best.

[A like provision is found in subsequent appropriation acts.]

Act September 22, 1888, 25 Stat. 485—Limit of Number of Draught and Pack Animals [Superseded omitted part of Act of July 5, 1884, printed above]

. . . . For transportation of the Army, including the purchase and hire of draught and pack animals: *Provided*, That hereafter no part of this appropriation shall be expended in the purchase for the Army of draught animals until the number on hand shall be reduced to five thousand, and thereafter shall only be expended for the purchase of a number sufficient to keep the supply up to five thousand.

[The proviso in this section is not found in the later Appropriation Acts. The provision as to number found in the Act of March 4, 1915, 38 Stat. 1077, is as follows:]

. . . . For the purchase and hire of draft and pack animals in such numbers as are actually required for the service, including reasonable provision for replacing unserviceable animals;

Act February 27, 1893, 27 Stat. 484—Expenditures on Buildings, etc., by Quartermaster's Department

. . . . That hereafter no expenditures exceeding five hundred dollars shall be made upon any building or military post, or grounds about the same, without the approval of the Secretary of War for the same, upon detailed estimates by the Quartermaster's Department; and the erection, construction, and repair of all buildings and other public structures in the Quartermaster's Department shall, as far as may be practicable, be made by contract, after due legal advertisement. . . .

[Note: A like provision has appeared in all subsequent Army appropriation acts.]

Construction of Quarters for Hospital Stewards

For construction of quarters for hospital stewards at military posts already established and occupied, ... *Provided*, That hereafter the posts at which such quarters shall be constructed shall be designated by the Secretary of War, and such quarters shall be built by contract, after legal advertisement, whenever the same is practicable.

Purchases of Medicines, etc., for Army

. . . . That hereafter so much of section thirty-seven hundred and nine, Revised Statutes, as requires advertisement before purchase shall not apply to the purchase of medicines and medical supplies.

Act October 6, 1917, 40 Stat. 364—Purchase of Ambulances

. . . . For the purchase of medical and hospital supplies; gas masks; motor ambulances, and motorcycles for medical service, their maintenance, repair, and operation: *Provided*, That the Secretary of War may in his discretion select types and makes of motor ambulances for the Army and authorize their purchase without regard to the laws prescribing advertisement for proposals for supplies and material for the Army;

Act August 29, 1916, 39 Stat. 639—Medical Department Contracts to be in Writing When in Excess of \$500

. . . . That hereafter, whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Surgeon-General or by officers of the Medical Department authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties, but in all other cases contracts shall be prepared under such regulations as may be prescribed by the Surgeon-General;

Act March 2, 1895, 28 Stat. 787—Reports by Secretary of War, Quartermaster-General, and Commissary-General of Contracts No Longer Required

That so much of section two hundred and twenty-nine Revised Statutes of the United States as requires the Secretary of War to lay before Congress at the commencement of each regular session a statement of all contracts for supplies or services which have been made by him or under his direction during the year preceding, and so much of the Army appropriation Act for the fiscal year eighteen hundred and eighty-five, approved July fifth, eighteen hundred and eighty-four, as requires the Quartermaster-General and the Commissary-General of Subsistence to report all purchases of supplies made by their departments, with their cost price and place of delivery, to the Secretary of War for transmission to Congress annually, be, and the same are hereby, repealed.

Act March 23, 1910, 36 Stat. 261—Ordnance Contracts to be in Writing When in Excess of \$500

. . . . Hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Chief of Ordnance, or by officers under him authorized to make them, and are in excess of five hundred dollars in amount, such contracts shall be reduced to writing and signed by the contracting parties with their names at the end thereof. In all other cases contracts shall be prepared under such regulations as may be prescribed by the Chief of Ordnance.

Act May 11, 1908, 35 Stat. 125—Purchases of Special Ordnance Articles

Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient.

Act August 29, 1916, 39 Stat. 622—Contracts of Signal Corps to be in Writing When in Excess of \$500

. . . . That hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Chief Signal Officer, or by officers of the Signal Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Chief Signal Officer.

Act March 3, 1883, 22 Stat. 564—Limitation of Expenditures; Purchase of Supplies for United States Soldiers' Home, Washington, D. C.

Sec. 3. That no new buildings shall be erected or new grounds purchased, nor shall any expenditure of more than five thousand dollars be made, until the action of the board thereon shall be approved by the Secretary of War. All supplies that can be purchased upon contract shall be so purchased, after due notice by advertisement, of the lowest responsible bidder. Such bidder shall give bond, with proper security, for the performance of his contract.

Act June 3, 1916, 39 Stat. 205

An act for making further and more effectual provision for the national defense, and for other purposes.

Sec. 89. HORSES FOR CAVALRY AND FIELD ARTILLERY OF NATIONAL GUARD. Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase, under such regulations as the Secretary of War may prescribe, of horses conforming to the Regular Army standards for the use of Field Artillery and Cavalry of the National Guard, said horses to remain the property of the United States and to be used solely for military purposes.

Sec. 86. Any State, Territory, or the District of Columbia may, with the approval of the Secretary of War, purchase for cash from the War Department for the use of the National Guard, including the officers thereof, any stores, supplies, material of war, and military publications furnished to the Army, in addition to those issued under the provisions of this Act, at the price at which they shall be listed to the Army, with cost of transportation added. The funds received from such sale shall be credited to the appropriation to which they shall belong, shall not be covered into the Treasury, and shall be available until expended to replace therewith the supplies sold to the States in the manner herein authorized: *Provided*, That stores, supplies, and material of war so purchased by a State, Territory, or the District of Columbia may, in time of actual or threatened war, be requisitioned by the United States for use in the military service thereof, and when so requisitioned by the United States and delivered credit for the ultimate return of such property in kind shall be allowed to such State, Territory, or the District of Columbia.

[Note: For certain statutory provisions common to War and other departments, see acts classified under "Navy," pages 242-253.]

Sec. 123. PROCUREMENT OF GAUGES, DIES, JIGS, AND SO FORTH, NECESSARY FOR MANUFACTURE OF ARMS, AND SO FORTH. The Secretary of War be, and he is hereby, authorized to prepare or cause to be prepared, to purchase or otherwise procure, such gauges, dies, jigs, tools, fixtures, and other special aids and appliances, including specifications and detailed

drawings, as may be necessary for the immediate manufacture, by the Government and by private manufacturers, of arms, ammunition, and special equipment necessary to arm and equip the land forces likely to be required by the United States in time of war: *Provided*, That in the expenditure of any sums appropriated to carry out the purposes of this section the existing laws prescribing competition in the procurement of supplies by purchase shall not govern, whenever in the opinion of the Secretary of War such action will be for the best interest of the public service.

SEC. 124. NITRATE SUPPLY. The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.

The President is authorized to lease, purchase, or acquire, by condemnation, gift, grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire by condemnation materials, minerals, and processes, patented or otherwise, necessary for the construction and operation of such plants and for the manufacture of such products.

The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of \$20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

Sec. 120. PURCHASE OR PROCUREMENT OF MILITARY SUPPLIES IN TIME OF ACTUAL OR IMMINENT WAR. The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war,

or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.

Act July 9, 1918, 40 Stat. 45—Army Appropriation

. . . . *Provided*, That where practical so to do no work be done or contract made under or by authority of any provision of this Act on or under a percentage or cost-plus percentage basis, nor shall any contract, where circumstances so permit, be let involving more than \$1,000 until at least three responsible competing contractors shall have been notified and considered in connection with such contract and all contracts to be awarded to the lowest responsible bidder, the Government reserving the right to reject any and all bids.

PAYMENTS FROM TOTAL AVAILABLE BALANCES. That during the present emergency when pressing obligations are required to be paid by a disbursing officer of the Army and the allotment to his official credit under the proper appropriation or appropriations is temporarily insufficient to pay the same, he is authorized to make payments from the total available balance to his official credit, provided sufficient funds under proper appropriation or appropriations have been appropriated by the chief officer of the bureau or department for the expenditure. When such disbursements are made, the accounts of the disbursing officer shall show the charging of the proper appropriations, and the balances thereunder, which will be adjusted by the disbursing officer on receipt of funds, or by the accounting officer of the Treasury.

Act March 2, 1919

To provide relief in cases of contracts connected with the prosecution of the War, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the Presi-

dent, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further*, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen: *And provided further*, That the Secretary of War shall report to Congress at the beginning of its next session following June thirtieth, nineteen hundred and nineteen, a detailed statement showing the nature, terms, and conditions of every such agreement and the payment or adjustment thereof: *And provided further*, That no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right of recovery of any money paid by the Government to any party under any settlement entered into, or payment made under the provisions of this Act, if the Government has been defrauded, and the right of recovery in all such cases shall exist against the executors, administrators, heirs, successors, and assigns, of any party or parties: *And provided further*, That nothing in this Act shall be construed to relieve any officer or agent of the United States from criminal prosecution under the provisions of any statute of the United States for any fraud or criminal conduct: *And provided further*, That this Act shall in no way relieve or excuse any officer or his agent from such criminal prosecution because of any irregularity or illegality in the manner of the execution of such agreement: *And provided further*, That in all proceedings hereunder witnesses may be compelled to attend, appear, and testify, and produce books, papers and letters, or other documents; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse such witness from testifying but such evidence or testimony shall not be used against such person in the trial of any criminal proceeding.

Sec. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section.

Sec. 3. That the Secretary of War, through such agency as he may designate or establish is empowered, upon such terms as he or it may determine to be in the interest of the United States, to make equitable and fair adjustments and agreements, upon the termination or in settlement or readjustment of agreements or arrangements entered into with any foreign government or governments or nationals thereof, prior to November twelfth, nineteen hundred and eighteen, for the furnishing to the American Expeditionary Forces or otherwise for War purposes of supplies, materials, facilities, services or the use of property, or for the furnishing of any thereof by the United States to any foreign government or governments, whether or not such agreements or arrangements have been entered into in accordance with applicable statutory provisions; and the other provisions of this Act shall not be applicable to such adjustments.

Sec. 4. That whenever, under the provisions of this Act, the Secretary of War shall make an award to any prime contractor with respect to any portion of his contract which he shall have sublet to any other person, firm, or corporation who has in good faith made expenditures, incurred obligations, rendered service, or furnished material, equipment, or supplies to such prime contractor, with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto, before payment of said award the Secretary of War shall require such prime contractor to present satisfactory evidence of having paid said subcontractor or of the consent of said subcontractor to look for his compensation to said prime contractor only; and in the case of the failure of said prime contractor to present such evidence or such consent, the Secretary of War shall pay directly to said subcontractor the amount found to be due under said award; and in case of the insolvency of any prime contractor the subcontractor of said prime contractor shall have a lien upon the funds arising from said award prior and superior to the lien of any general creditor of said prime contractor.

Sec. 5. That the Secretary of the Interior be, and he hereby is, authorized to adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce, either manganese, chrome, pyrites, or tungsten in

compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war; said minerals being enumerated in the Act of Congress approved October fifth, nineteen hundred and eighteen, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence expenses, supplies, postage, printing, and all other expenses incident to the proper prosecution of this work, both in the District of Columbia and elsewhere, as the Secretary of the Interior may deem essential and proper, shall be paid from the funds appropriated by the said Act of October fifth, nineteen hundred and eighteen, and that said funds and appropriations shall continue to be available for said purpose until such time as the said Secretary shall have fully exercised the authority herein granted and performed and completed the duties hereby provided and imposed: *Provided, however,* That the payments and disbursements made under the provisions of this section for and in connection with the payments and settlements of the claims herein described, and the said expenses of administration shall in no event exceed the sum of \$8,500,000: *And provided further,* That said Secretary shall consider, approve, and dispose of only such claims as shall be made hereunder and filed with the Department of the Interior within three months from and after the approval of this Act: *And provided further,* That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance: *And provided further,* That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April sixth, nineteen hundred and seventeen, and prior to November twelfth, nineteen hundred and eighteen, in a legitimate attempt to produce either manganese, chrome, pyrites, or tungsten for the needs of the Nation for the prosecution of the War, and that no profits of any kind shall be included in the allowance of any of said claims, and that no

investment for merely speculative purposes shall be recognized in any manner by said Secretary: *And provided further*, That the settlement of any claim arising under the provisions of this section shall not bar the United States Government, through any of its duly authorized agencies, or any committee of Congress hereafter duly appointed, from the right of review of such settlement, nor the right to recover any money paid by the Government to any party under and by virtue of the provisions of this section, if the Government has been defrauded, and the right of recovery in all such cases shall extend to the executors, administrators, heirs, and assigns of any party.

That a report of all operations under this section, including receipts and disbursements, shall be made to Congress on or before the first Monday in December of each year.

That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States: *Provided further*, That in determining the net losses of any claimant the Secretary of the Interior shall, among other things, take into consideration and charge to the claimant, the then market value of any ores or minerals on hand belonging to the claimant, and also the salvage or usable value of any machinery or other appliances which may be claimed was purchased to equip said mine for the purpose of complying with the request or demand of the agencies of the Government above mentioned in the manner aforesaid.

Approved, March 2, 1919.

PUBLIC WORKS CONTRACTS OF SECRETARY OF WAR

[See also Public Building Contracts of Treasury Department, page 260.]

R. S. Sec. 3717—Works: Separate Proposals and Contracts Required

Whenever the Secretary of War invites proposals for any works, or for any material or labor for any works, there shall be separate proposals and separate contracts for each work, and also for each class of material or labor for each work.

R. S. Sec. 230—Report of Bids for Works

Whenever the Secretary of War invites proposals for any works, or for any materials or labor for any work, he shall report to Congress, at its next session, all bids therefor, with the names of the bidders.

Act March 3, 1875, 18 Stat. 455—Contracts for Public Improvements; Preference to Domestic Materials and Labor

That in all contracts for material for any public improvement, the

Secretary of War shall give preference to American material; and all labor thereon shall be performed within the jurisdiction of the United States. . . .

Act June 25, 1906, 34 Stat. 463—Public Works; Fortifications; Advertisement for Proposals; Contracts; Securities

It shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for fortifications and other works of defense, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract.

Act March 15, 1898, 30 Stat. 326—Purchases Abroad of Material for Sacks for Artillery Cartridges; No Duty

. . . . And when, in the opinion of the Secretary of War, it is necessary to purchase material abroad for the manufacture of sacks for artillery cartridges, it shall be admitted free of duty.

Act March 2, 1901, 31 Stat. 905—Quartermaster's Department; Purchases of Supplies for Army

. . . . That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; but every open-market emergency purchase made in the manner common among business men which exceeds in amount two hundred dollars shall be reported for approval to the Secretary of War under such regulations as he may prescribe.

[In some respects the provisions of this act have been superseded by Act June 12, 1906, providing for open-market purchases. See page 266.]

Act April 28, 1904, 33 Stat. 518—Vessels of United States, to be Employed in Transport of Supplies for Army

That vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that

the rates of freight charges by said vessels are excessive and unreasonable, in which case contracts shall be made under the law as it now exists: *Provided*, That no greater charges be made by such vessels for transportation of articles for the use of the said Army and Navy than are made by such vessels for transportation of like goods for private parties or companies.

Time of Taking Effect of Act

Sec. 2. That this Act shall take effect sixty days after its passage.

Act July 25, 1912, 37 Stat. 222—Rivers and Harbors Works to be Carried on by Contract or Otherwise

All works of improvement heretofore or herein authorized to be prosecuted or completed under contracts may, in the discretion of the Secretary of War, be carried on by contract or otherwise, as may be most economical or advantageous to the United States.

Act August 11, 1888, 25 Stat. 423—River and Harbor Appropriations and Contracts

Sec. 3. That it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvements of rivers and harbors, other than surveys, estimates and gaugings, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract.

Act September 19, 1890, 26 Stat. 452—Contracts for River and Harbor Works

Sec. 2. That nothing contained in section thirty-seven hundred and seventeen of the Revised Statutes of the United States, nor in section three of the river and harbor Act of August eleventh, eighteen hundred and eighty-eight, shall be so construed as to prohibit or prevent the cumulation of two or more works of river and harbor improvement in the same proposal and contract, where such works are situated in the same region and of the same kind or character.

Act June 25, 1910, 36 Stat. 676—Written Contract Not Required Where Leases Temporary

Sec. 5. That the requirements of section thirty-seven hundred and

forty-four of the Revised Statutes shall not apply to the lease of lands, or easements therein, or of buildings, rooms, wharves, or rights of wharfage or dockage, or to the hire of vessels, boats, and other floating craft, for use in connection with river and harbor improvements, where the period of any such lease or hire is not to exceed three months.

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